

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TENNESSEE  
3                   AT KNOXVILLE, TENNESSEE

4                   )  
5                   SNMP RESEARCH, INC. and SNMP )  
6                   RESEARCH INTERNATIONAL, INC., )  
7                   )  
8                   Plaintiffs, )  
9                   )  
10                  vs. ) Case No. 3:20-cv-451  
11                  )  
12                  BROADCOM, INC., BROCADE )  
13                  COMMUNICATIONS SYSTEMS, LLC, )  
14                  and EXTREME NETWORKS, )  
15                  )  
16                  Defendants. )  
17                  )  
18                  )

19                   **MOTION PROCEEDINGS**  
20                   BEFORE THE HONORABLE DEBRA C. POPLIN

21                   **Friday, March 25, 2022**  
22                   **10:07 a.m. to 3:17 p.m.**

23                   **APPEARANCES:**

24                   **ON BEHALF OF THE PLAINTIFF:**

25                  ALVIN MATTHEW ASHLEY, ESQ.  
1                  OLIVIA WEBER, ESQ.  
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6                  JOHN L. WOOD, ESQ.  
7                  CHERYL G. RICE, ESQ.  
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11                   **REPORTED BY:**

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1           **APPEARANCES:** (Continued)

2           **ON BEHALF OF THE DEFENDANTS:**

3           ALISON PLESSMAN, ESQ.  
4           SALVATORE UMBERTO BONACCORSO, ESQ.  
4           (appeared telephonically)  
5           HUESTON HENNIGAN, LLP  
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6           Los Angeles, CA 90014  
7           Defendants: Broadcom, Inc. and Brocade  
7           Communications Systems, LLC

8           JOHN NEUKOM, ESQ.  
9           DEBEVOISE & PLIMPTON, LLP  
9           650 California Street  
10          San Francisco, CA 94108  
10          and  
11          LESLIE A. DEMERS, ESQ.  
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12          New York, NY 10001-8602  
12          Defendant: Extreme Networks, Inc.

13           **ALSO PRESENT:**

14          DR. JEFFREY CASE, SNMP Research;  
15          PHILLIP BLUM, ESQ., Corporate Counsel  
16          for Broadcom, Inc.

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1                   THE COURTROOM DEPUTY: All rise.

2                   The United States District Court for the  
3 Eastern District of Tennessee is now open pursuant to  
4 adjournment with the Honorable Debra C. Poplin, United  
5 States Magistrate Judge, presiding.

6                   Please come to order and be seated.

7                   We are here for a motion hearing in Case  
8 3:20-cv-451.

9                   Here on behalf of the plaintiffs are Alvin  
10 Matthew Ashley, Olivia Weber, John Wood, and Cheryl  
11 Rice.

12                  Are the plaintiffs ready to proceed?

13                  MS. RICE: Yes, Your Honor.

14                  THE COURTROOM DEPUTY: And here on behalf of  
15 the defendants are John Neukom, Leslie -- is it Demers?

16                  MS. DEMERS: Yes.

17                  THE COURTROOM DEPUTY: -- Alison Plessman,  
18 Phillip Blum, and on the telephone is Salvatore  
19 Bonaccorso.

20                  Are the defendants ready to proceed?

21                  MR. NEUKOM: Yes, Your Honor.

22                  THE COURT: All right. Let me ask --

23                  Ms. Rice. It's fine. Take the podium.

24                  Will there be primary counsel for argument, or  
25 is it going to be handled in some other fashion?

1 MS. RICE: Well, Your Honor, good morning. May  
2 it please the Court, happy to be here today on behalf of  
3 the plaintiffs.

4 Yes, Mr. Matt Ashley will be taking the  
5 leadoff. However, we probably will be sharing the  
6 arguments --

7 THE COURT: All right.

8 MS. RICE: -- as we move along.

9 So I would like to take the opportunity, very  
10 briefly, Your Honor, to introduce Matt Ashley and Olivia  
11 Weber, both members of the California Bar who have been  
12 admitted pro hac vice in this matter. This is their  
13 first appearance before the Court.

14 THE COURT: Welcome to the district.

15 MS. RICE: And then, of course, Dr. Jeffrey  
16 Case, who is the founder and chief officer of the  
17 plaintiffs, SNMP Research and SNMP Research  
18 International.

19 THE COURT: Okay.

20 MS. RICE: I'm going to turn it over to  
21 Mr. Ashley.

22 THE COURT: Okay.

23 MR. ASHLEY: Thank you.

24 Good morning, Your Honor. I thought that the  
25 way, ultimately, we might handle this is: Instead of --

1 because of the volume of requests and the volume of  
2 objections and how they tend to repeat themselves, we  
3 could maybe handle it like we did in the briefing, like  
4 the parties did in the briefing, which is take it by --  
5 issue by issue.

6           But before we dive into the issues -- and some  
7 are more pressing than others because of the time that  
8 we have left in this case. Particularly, in about  
9 four-and-a-half months, our opening expert --  
10 plaintiffs' opening expert reports are due.

11           But before we get into those issues, I thought  
12 it might help you if I could give you a little bit of  
13 background about the case. It's in the briefing, too,  
14 to some extent.

15           THE COURT: And I have reviewed --

16           MR. ASHLEY: Yeah.

17           THE COURT: -- the Complaint and all of the  
18 briefings on the motion.

19           MR. ASHLEY: So, the plaintiffs, SNMP Research  
20 International and SNMP Research, Inc., they're Tennessee  
21 corporations. Their principal place of business is here  
22 in Knox County, and they are -- they were founded by  
23 Dr. Case and his wife, his late wife, and he is the  
24 owner and operator of them today; although, they do have  
25 employees.

1           SNMP takes its name from the protocol, Simple  
2 Network Management Protocol. And just at a very high  
3 level, a protocol is a way of communicating. So it's a  
4 language. And SNMP's protocol is directed at  
5 communicating with respect to the management of a  
6 network.

7           And maybe it would help you to have a little  
8 explanation of the products that are at issue in this  
9 case. You know, I'm going to be very generalized here,  
10 probably over-generalized, because it's not like we're  
11 doing a tech tutorial.

12          But the products at issue in this case are, by  
13 and large, what are called switches. And all a switch  
14 really is is: It's a product that allows you to plug in  
15 a whole bunch of electronic devices and then for there  
16 to be communications passed to and from and received and  
17 sent by these devices.

18          So, for, like, the Brocade products, the  
19 storage area network products, you could think of it as  
20 a way to interconnect a bunch of storage devices. Like,  
21 you might have hard drives and then allow multiple  
22 computers to be able to access those simultaneously.

23          And for Extreme, it's Ethernet switches. So  
24 it's a switch where you can have a bunch of computers  
25 hooked up and they can communicate with each other.

1           And what SNMP does, at, again, a very high  
2 level -- and this is not trying to be all-inclusive.  
3 But it really helps the network administrator set up  
4 that switch and monitor what's going on with that  
5 switch. So it's pretty critical.

6           Now, it's been around a long time. Dr. Case  
7 was instrumental in the development of the protocol,  
8 and, of course, then he developed his software which is  
9 an implementation of that protocol. It's in all sorts  
10 of products.

11          All sorts of companies, large and small, use  
12 Dr. Case's software, and a lot of the governmental  
13 entities do, too, and it's because it's very good, very  
14 proven, very reliable, and been around a long time.

15          And I'm going to talk about 20 years ago and  
16 get into the license at issue in this case, and that was  
17 in 2001, and Brocade obtained license rights to  
18 Dr. Case's software.

19          Now, those licenses, Dr. Case's licenses, have  
20 very restricted, detailed restrictions, on them. You  
21 can use them with certain platforms, certain processors.  
22 There is all sorts of limitations that I won't go into.

23          One of the key limitations, though, is that you  
24 can't transfer it. You can't assign it. Not without  
25 SNMP's express permission. And that includes -- an

1 assignment includes a merger. That's number one.

2 Number two, you cannot -- the Brocade license,  
3 you cannot disclose his source code to third parties.

4 So that contract was amended several times.

5 Again, I'm not going to get into one versus three versus  
6 five. Just understand it's been around a long, long  
7 time.

8 And now let's fast forward six years, 2017, and  
9 that's -- that's where this all starts. Kind of late  
10 2016, Broadcom and Brocade announce they're going to  
11 merge -- and I could have the date a little off. And  
12 then around that same time when this merger is going to  
13 occur, they're going to spin off or divest a portion of  
14 Brocade's business to Extreme.

15 And the letter that kicks this off -- I think  
16 it would be helpful, Your Honor, if you have access to  
17 the Weber declarations in support of both motions. I'm  
18 mainly going to be working off of the Extreme one, but  
19 I'm going to start with the Broadcom/Brocade Motion to  
20 Compel.

21 And this document is under seal, so I'm not  
22 going to be verbatim through it, but I did want you to  
23 actually lay eyes on the document that sort of kicks  
24 this all off.

25 It's actually -- it's Exhibit A to the Weber

1 declaration. If it helps you, the Docket No. is 118.  
2 And I can hand it up if you'd like. It's part of the  
3 record. But if you have access, I won't.

4 THE COURT: I can just get this pulled up.

5 MR. ASHLEY: And other than this one, Your  
6 Honor, the other ones I'll be talking about, we can hand  
7 out. We just happen to only have one copy of this one,  
8 unfortunately.

9 THE COURT: Oh, it's fine. It's just -- my  
10 remote connection was not set up. It's taking just a  
11 moment.

12 MR. ASHLEY: And if you can't find 118, you can  
13 look at the public version at 116 dash -- Docket 116-2.

14 THE COURT: I've got 118. It's starting to  
15 download.

16 All right. I'm with you.

17 MR. ASHLEY: You have it?

18 THE COURT: Uh-huh.

19 MR. ASHLEY: So it should -- to make sure that  
20 we're looking at the same thing, at the top right  
21 corner, there is a big Brocade emblem, and it's dated  
22 September 13, 2017.

23 THE COURT: Yes.

24 MR. ASHLEY: Okay. So that's really what I  
25 wanted to point you to. I won't go into the detail and

1       the substance, but this was a letter that was sent by  
2       Brocade, basically on behalf of Extreme, Brocade and  
3       Broadcom, and it's dated September 13th, 2017, and the  
4       subject line talks about what it is. And basically, in  
5       a nutshell, this was the -- essentially, like, a notice,  
6       but it asked Dr. Case's company to agree and accept that  
7       there was going to be a transfer.

8                 It kind of roughly describes the transaction.  
9       I think the transaction later changed a bit, in terms of  
10      the way it was done. But this is sort of the beginning  
11      of SNMP's notice that they were looking to do this.

12               And if you look to -- for instance, in the  
13      first sentence, you see these references to the word  
14      "affiliate." So SNMP's being told, hey, us an affiliate  
15      and them an affiliate, and there's these affiliates, and  
16      we're going to do something with your software.

17               And if you turn to page 3, there is -- it's  
18      already been pre-signed by Brocade and Extreme, and  
19      they're asking Dr. Case's company to acknowledge and  
20      agree to it.

21               And up at the top of the notice, the notice  
22      goes to Extreme and they go to Broadcom, Limited.  
23      Broadcom, Limited is the predecessor to what is now  
24      Broadcom, Inc., which is one of the defendants, which  
25      will give you an indication of why Broadcom, Inc. -- one

1 of the reasons why Broadcom, Inc. is in this case and  
2 why we're inquiring into Broadcom, Inc. and affiliates.

3           And when Dr. Case received this, his attorney,  
4 John Wood -- who is sitting right over there -- wrote  
5 back -- this one is not in the record, but we can  
6 provide it; I don't think any of this is in dispute --  
7 within a few weeks of this, wrote back to all of  
8 Brocade, Extreme, and Broadcom and said, "No, we don't  
9 consent. Not that we would never consent, but you can't  
10 just send us a letter like this. We need to know more  
11 about this transaction, what's going to happen with our  
12 software," etcetera.

13           So, as it turns out, though, they just  
14 proceeded anyway with the transfer of SNMP's software to  
15 Extreme, and that included the source code.

16           What happened after that was: Six months  
17 later, Extreme -- after this transfer has already  
18 occurred, despite the lack of consent, Extreme reaches  
19 out to SNMP again. They don't write to John Wood.

20           If you -- the rest of these are not under seal.  
21 If you can pull up the Weber declaration in support of  
22 the Motion to Compel as to Extreme, I'm only going to  
23 look at a couple of these exhibits, but I did want to  
24 point out some key language to you.

25           Exhibit A is the second reach-out from Extreme

1 to SNMP. And I'll direct you -- this is an e-mail. So  
2 I'm going to start in the back, or approximately the  
3 back. If you look at page 9 of 11 -- if you're looking  
4 at the Docket 96-3, it would be 9 of 11. If you're  
5 looking at the Bates stamp, it would be SNMP 4570.  
6 That's where we'll start.

7           Are you there?

8           THE COURT: Yes.

9           MR. ASHLEY: So, if you look, there is an  
10 e-mail dated Monday, the 16th of April 2016, from  
11 someone named Jennifer Sipes at Extreme to Steve  
12 Blizzard, who is an officer at SNMP, and they -- and  
13 they say -- and I'm just going to jump to the pertinent  
14 paragraph. It's the third paragraph.

15           "In connection with and prior to the  
16 acquisition, you were forwarded the attached assignment  
17 notice in September 2017." That's what we just looked  
18 at. "Unfortunately we have not heard back from you to  
19 date." That is not true. "In order for Extreme to be  
20 assured of your understanding of the current  
21 arrangement, would you please take a moment and sign the  
22 attached." It goes on.

23           And if you flip backward a page, you see the  
24 response that they get. It's from John Wood. And John  
25 writes near the bottom, "Jennifer, I am counsel for SNMP

1 Research, and I did respond to your assignment notice  
2 shortly after you sent it in September. I have attached  
3 that correspondence. The license between Brocade and  
4 SNMP Research is not assignable without SNMP's consent,  
5 and SNMP Research has not provided that consent. If  
6 Extreme is using or distributing SNMP Research software  
7 it obtained from Brocade, then it is doing so out of  
8 license."

9 And he said, "I'd be glad to have a call and  
10 you give me more information about how it's being done  
11 and we can talk about an assignment."

12 Then she responds about a week later. And,  
13 again, I'm going to jump to the main point. Second  
14 sentence, "As discussed, below is a Brocade product list  
15 with SNMP Research software." And she lists VDX 8770  
16 Series. These are a series of products. It's a product  
17 line. No trouble finding that out.

18 And these discussions progressed. Mr. Wood  
19 kept trying to find out more and more. You know, after  
20 he gets the names, he wants to know things like  
21 quantities.

22 So, for instance, if you go to Exhibit B -- or  
23 in addition, Your Honor, another key issue he was  
24 looking into was there a transfer of the Brocade product  
25 line that was in the data center business to Extreme.

1       And so they just -- they're still selling those.

2                  But we also come to learn that they created  
3 their own products with that software. And what that  
4 means is: The reason why you give source code to a  
5 company like a Brocade or an Extreme is they're not just  
6 receiving, like, the working program like you would  
7 in -- you know, imbedded in a computer; they're getting  
8 the source code so they can work it in with their code  
9 and put it into their product to have a working product.  
10 So we come to find that Extreme has new products.

11                  And if you look at Exhibit B -- I'm just going  
12 to take you to the first page. The very bottom,  
13 Mr. Wood writes, "Can you let me know the Extreme  
14 products that are using SNMP software without a  
15 license."

16                  So you hear sometimes in this case, "We just  
17 don't know" -- because, for instance, Brocade has a  
18 different license with SNMP, one, maybe two, that are  
19 not at issue in this case, and Extreme had one a long  
20 time ago and products basically ran out.

21                  But we asked, "Which ones are you using without  
22 a license?" They responded.

23                  Now, Exhibit C is under seal, but you can flip  
24 to it. And I won't go into the detail, but you can just  
25 kind of look at this and you'll see what John Wood is

1 trying to do is: "Tell me how much. What shipped when?  
2 Tell me for 2017. Tell me for 2018. Tell me for 2019."  
3 And they did, down to SKU numbers. "You're using our  
4 software without a license. Which ones?"

5 Now, Extreme knows this. So there is no doubt  
6 that Brocade knows it. Extreme got the stuff from  
7 Brocade.

8 But when you -- as we're finding this out, we  
9 send a notice of breach to Brocade. John Wood sends  
10 that, but says, "You can try and cure it."

11 I should note one more thing: During these  
12 discussions with Extreme, it became clear that what had  
13 happened, it was not a transfer. It wasn't like Brocade  
14 just transferred the rights to Extreme and then just  
15 washed their hands of it. They transferred the source  
16 code, which Extreme is using and making new products  
17 with. But Brocade is still doing it, too. So they're  
18 both using it now. So they're in breach. Brocade is in  
19 breach and Extreme is selling without a license.

20 And I realize these are all allegations. I  
21 haven't proven any of this. I'm just walking you  
22 through what our allegations are so you have the scope  
23 of the case, so you know what's relevant and what's not  
24 relevant.

25 So John Wood sends a notice of breach. They

1       don't respond and say, "No, we didn't breach." He gives  
2       them an opportunity to cure and they don't. So he  
3       terminates not the -- not the agreement itself, but  
4       their use and distribution rights, redistribution  
5       rights, Brocade's, under the contract.

6               They were in breach long before that, but now  
7       it's like you don't -- now, just to make it really  
8       clear, your use and distribution rights are gone.

9               And after that Brocade is trying to get a  
10      license. And I won't go through the same type of  
11      rigmarole, but they have the same sort of conversation.  
12      And then Brocade is asked, "What are you using? Because  
13      to know what" -- "to know what we should do, we need to  
14      know what you did."

15               And they also provide a list of the products  
16      that Brocade is using SNMP software without a license,  
17      and that is the Weber declaration, Exhibit B. It's  
18      under seal, but if you look at page 26, it's 166-3 at  
19      26. You can look. Here they are.

20               So, with that background in mind -- and before  
21      I get into the issues, let me just tell you what we want  
22      generally. What all this discovery is directed at --  
23      because it looks like a lot, but it's -- actually, if  
24      you just -- if you understand what you have to prove in  
25      a case like this, it becomes readily apparent that what

1       we're asking for is relevant.

2                  The question becomes: Is it burdensome? Is  
3 there privilege issues here? Is it burdensome? And  
4 have they met their burden to show it's burdensome?  
5 Very sophisticated in that they can do searches and  
6 things like that.

7                  So, with all that in mind, with respect to  
8 liability -- and I'm going to focus -- I'm going to put  
9 aside the breach of contract claim for now. I'm not  
10 going to -- I'm just going to talk about copyright  
11 infringement.

12                 With respect to the liability portion of the  
13 case, we have to show copying. And not identical  
14 copying, copying. We're going to have to show code and  
15 say that didn't happen by accident. And it's got to be  
16 substantially similar. And we have to show they had  
17 access. The access is not going to be difficult in this  
18 case.

19                 Yeah, their admissions are great. The preceded  
20 admissions are great. That's why we essentially used --  
21 that's what we used in the Complaint for the actual  
22 products that we called accused products in the  
23 Complaint.

24                 But make no mistake, the allegation is  
25 copyright infringement. You're infringing our

1       copyrights. And you don't have to know all the  
2       products. You're supposed to look and tell us the  
3       products under oath which ones. You know how to do it.  
4       You did it before the case; you can do it again.

5               And you don't get to direct how we define our  
6       terms. They can -- they can serve discovery on us with  
7       their defined terms, as long as our terms are  
8       understandable and reasonable.

9               And one of our concerns is that when  
10      you -- aside from their admissions, the way you  
11      generally prove copying in a software copyright  
12      infringement case is comparing source code. That's not  
13      a -- that happens in all copyright cases involving  
14      source code. I mean, on software, you compare source  
15      code.

16               And that's why before we even served a single  
17      request, the very beginning of this case, the parties  
18      filed a 26(F) report. Everybody had a different take on  
19      everything, the defendants' portion, plaintiffs'  
20      portion, but there was one thing that everybody was  
21      universal on. We said to the judge, "This is going to  
22      involve source code review, thousands of lines. Tedium  
23      reviews of source code. So we have to have more time  
24      than normal." That's at Docket 46, page 4, paragraph 6.  
25      I know you've seen it in the briefing, so I won't quote

1       it, unless you want me to. But it's basically the  
2       parties know that we're going to need experts to review  
3       this stuff.

4           And you should know, Your Honor -- I mean, I  
5       think the impression is being given that somehow we just  
6       want to have a bunch of irrelevant code to review.  
7       There is nothing more mind numbing, hardly, than  
8       reviewing source code and comparing it. We don't  
9       benefit from being dumped a bunch of irrelevant source  
10      code.

11          Here is the problem: With source code,  
12       particularly like SNMP's, you don't just, like, have it  
13       in one place. It's kind of embedded. Like I told you,  
14       when they build their product, they take our code and  
15       they do what they will with it. And they might change a  
16       little bit here and there; okay?

17          And they keep focusing on the version numbers.  
18       None of that matters at the end of the day. At the end  
19       of the day, we have copyrighted work; they have  
20       products. Experts will compare, and they will say how  
21       substantially similar are they and there was no  
22       accident.

23          And we have to have the source code for the  
24       full product because we can't let the other side, who is  
25       accused of infringing and copying, be the arbiter of

1 what portion of the code they say is -- is -- they deem  
2 appropriate for us to look at and compare. It's a  
3 copying case. So we need to get on that very soon.

4 THE COURT: And as I understand, there was a  
5 proposal that that would be done simultaneously.

6 MR. ASHLEY: That's what we proposed.

7 So what happened was: You might remember they  
8 filed a Motion to Stay Discovery. In that Motion to  
9 Stay Discovery, they hinted that, "Oh, we can't answer  
10 these requests because we have to see their source code  
11 first."

12 This is -- this is, like, literally right after  
13 we served our requests. We said, "Okay. Let's  
14 exchange. You want our source code, it's fine. But  
15 we've asked you for source code. Let's exchange."

16 We can't hide the ball or anything. You know,  
17 what's on deposit with the Copyright Office, that's what  
18 it is. It's not a trade secret case.

19 And we said, "Let's just simultaneously  
20 exchange it." They said no. That was offered, I think,  
21 in the end of 2020, or the beginning of 2021, like  
22 within a few weeks of our first requests which we're  
23 still fighting about.

24 What they want to do, Your Honor -- I'm kind of  
25 jumping ahead here to the issue, but what they want to

1 do is: They want us to produce our code on deposit at  
2 the Copyright Office. They want to go look at it, and  
3 they want to produce potentially subsets, if anything,  
4 subsets of their codes and products, the parts that they  
5 want to produce. And we think that doesn't work. And  
6 I'm going to go into that a little bit more.

7 THE COURT: Okay.

8 MR. ASHLEY: So that's the liability portion.

9 The damages -- and I'm not talking about the  
10 breach of contract claim. The damages portion in a  
11 copyright case, there is multiple components of damage.  
12 There is the component you probably think of, which is  
13 sort of the compensatory component, you know, out of  
14 pocket and whatnot. I'm not saying -- I'm not trying to  
15 delineate which damages we can get, but there is that  
16 damages component.

17 But most people putting in the word "damage" in  
18 a copyright case, also a component you're entitled to,  
19 which is disgorgement of profits. And these are very  
20 profitable, massively-expensive products. These are not  
21 the router that you buy at Best Buy. These are hundreds  
22 of thousands of dollars, and -- I mean, per product.

23 I'm not saying -- I don't know that for sure  
24 because I don't have all the figures, but these are  
25 big-deal products. And SNMP is a big deal in these

1 products. It's a reason why they didn't take it out  
2 right away.

3 And our only obligation as the plaintiff under  
4 the Copyright Act for disgorgement of profits in a case  
5 like this where the software -- we're going to show the  
6 software that's in the product, the infringing software,  
7 our obligation is to state, What are your gross revenues  
8 on these products? And it is their obligation --

9 (A discussion was had off the record amongst  
10 co-counsel for the plaintiffs.)

11 MR. ASHLEY: Oh, yeah, yeah. I should -- I  
12 should -- I should clarify one thing. I'm jumping ahead  
13 because I said they are -- they are offering to produce  
14 code that's in their product. They haven't even agreed  
15 to do that yet.

16 Their offer is -- in their offer for a  
17 simultaneous exchange, theirs is, "You give us all yours  
18 on deposit with the Copyright Office," and Brocade says,  
19 "We'll give you back the code you sent us if we have  
20 it." You know, they don't tell us if we have it. That  
21 doesn't tell us what's in the product.

22 I'll get to the competing compromises in a  
23 moment, but I misspoke.

24 THE COURT: Okay.

25 MR. ASHLEY: So -- but what happens is:

1 Defendants have an advantage right now on the damages  
2 case. It's kind of reversed, in terms of who has the  
3 asymmetry of information. They have all the  
4 information. They're fine to sit here and do nothing  
5 for as long as they can because they know they're going  
6 to have to produce the gross revenues. But then what  
7 happens is, there is a fight. The defendants have to  
8 prove costs that are properly deductible under copyright  
9 law so they can show that they -- they can reduce those  
10 costs, in terms of how much they have to disgorge.

11 They also have to show if they're going to try,  
12 oh, the bottom-line profit, it shouldn't be apportioned  
13 a hundred percent to the infringing use; it should be --  
14 that there is other features that matter.

15 So things that talk about what's important to  
16 the product, our software or something else, will be  
17 important, and they control it all right now.

18 So they're very happy say, "What are you  
19 talking about? I don't understand what you mean by  
20 related to the financials," or, "We'll produce documents  
21 sufficient to show." I don't want documents sufficient  
22 to show. They will just give me a big cost. I want to  
23 understand the costs. They say, "Well, you don't need  
24 to know anything from the day before the breach." Of  
25 course, we do. I want to know if what they're saying

1 now about their margins is consistent with what they  
2 said before the margins.

3 They talk about these products internally. How  
4 profitable are they? Are we making money? How much  
5 money are we making?

6 And we haven't gone far back at all. The  
7 breach was in 2017. We're going to January 1st, 2017.  
8 You've probably seen cases where when there is a breach  
9 in 2017, you go back two or three years, four years,  
10 five years to get a complete picture.

11 I think we even cited a case, maybe, that you  
12 decided where that was the case. So we're not being  
13 pigs here about how far back we go. In fact, as it  
14 turns out, they picked the exact same time period,  
15 January 1st, 2017 until today, or they have none at all,  
16 where ours are pretty much all January 1st, 2017 up  
17 through. And, actually, they don't even say up to  
18 today. They want to stop all -- not all, but  
19 significant, important productions on the date of the  
20 Complaint. Like damages, as if they're selling  
21 something after the date of the Complaint, it doesn't  
22 somehow become relevant.

23 So you could probably see now why we have some  
24 breadth to our -- our damages discovery. And what  
25 normally happens there is: There is a dialogue with the

1 other side. They say, "Well, this would encompass this.  
2 It would encompass that. We have this and we have  
3 that." And then you decide, "Well, okay. That sounds  
4 like it's marginally relevant and too burdensome, so we  
5 won't do it. We will agree not to." But they don't do  
6 that. So, that's damages.

7           And then there is wilfulness. So this is not  
8 like some -- and you have patent cases, for instance,  
9 where somebody is going along on their merry way selling  
10 products, and then all of a sudden, bam, eight years  
11 later, somebody says, "You're infringing my patent. I  
12 want damages back as far as the statute of latches  
13 allows."

14           This is a willful infringement case, or that's  
15 what we intend to prove. 2017, can we do it? No. Then  
16 from 2018 to '20, trying to hunt them down on what  
17 they're doing with our software, all the while they're  
18 infringing; they're selling.

19           So we've propounded a lot of the discovery  
20 saying, "What did you say to get" -- but after John Wood  
21 writes this e-mail, what happens? There has got to be  
22 discussions. This is a big deal.

23           What about the discussions internally? And  
24 today, as of today, after a year of discovery, we don't  
25 have a single e-mail between them. We don't have a

1 single e-mail. We don't have a single line of source  
2 code. They tout that they have produced these  
3 documents. The document production is always correct.  
4 We file a motion, or whatever applies to you after you  
5 set a hearing and things start to roll in. But most of  
6 them are like SEC filings, public documents of that  
7 sort.

8 We don't have any documents yet. And it's so  
9 easy for them to produce saying, "Here is our product  
10 that you've accused. Here is the revenues. Here is the  
11 costs." They keep that. They can get that. That's  
12 something that any plaintiff who can delineate the  
13 accused products in the Complaint should get. We  
14 shouldn't have to prove our case for that.

15 By the way, I just showed you we have more than  
16 you almost ever get in a copyright case. You get  
17 admissions saying, "What are you using without a  
18 license?" And they give it to you. And now they say,  
19 "Huh? What? Why do I have to produce this  
20 information?" Actually, they don't even say that. They  
21 say -- I don't think they want to say, "We're not going  
22 to produce it." They exclude it that it isn't relevant.  
23 They say, "We will." But when? Why are we still doing  
24 this? We've got expert reports in four months.

25 Well, I'll tell you why. It's the asymmetry of

1 information. They have our source code. Make no  
2 mistake about it, they have our source code. We  
3 licensed it to them. They can be looking at it right  
4 now. We don't have their source code.

5 They claim they need our source code on deposit  
6 with the Copyright Office. And that's what I'm going to  
7 get into right now is the source code because it is a  
8 critical issue. It is so time sensitive. They say,  
9 "Well, we can't give you our code because we don't  
10 understand the case. We don't know where this software  
11 is in this because you've sued us for copyright  
12 infringement." You know, "The stuff before the case,  
13 that was" -- "We just wanted to give you money for free.  
14 It wasn't copyright infringement." Of course, they  
15 always knew it was copyrighted.

16 Now they're saying they haven't seen a deposit  
17 copy, but what does that matter right now? What does  
18 that matter for them to go back and say, "Here is the  
19 product in" -- I mean, "the source code in our product."  
20 We can't change what's with the Copyright Office. And  
21 we said we'll do it simultaneous.

22 Who's hiding the ball? We don't have -- we  
23 don't have nothing to hide. This is not like a -- they  
24 cite these trade secret cases where a Court is really  
25 disturbed because somebody comes in, like, usually a

1 competitor, like, this is their Puerto Rico case, and  
2 somebody comes in and says, "I'm suing you for" -- "my  
3 competitor, for trade secrets they have. Let me see  
4 your trade secret. Let me see your source code." And  
5 the Court says, "No, you have to show your trade secrets  
6 first so that you can't adjust what your trade secrets  
7 are by what you see." So you make them come in so they  
8 can't hide the ball.

9 It's -- it's the defendants that are trying to  
10 do that. It's the exact opposite. They want to see  
11 code, come up with arguments, and then what they want to  
12 do is be the arbiters of what is produced. It's real  
13 simple what should be produced. What's in the product?

14 They haven't put in any affidavit of -- that  
15 it's burdensome. Almost every case they cite -- and I'm  
16 happy to go into them. Almost every case they cite,  
17 there is a detailed affidavit where somebody says, "This  
18 is going to be really hard."

19 It's not going to be hard for a company like  
20 Broadcom or Extreme. They keep it in a source code  
21 file. But the way they're kept, it's just like a -- you  
22 probably have Word files and Outlook files, and you have  
23 a folder and you have subfolders. Every time you do  
24 something, you put it in a new folder. And you have  
25 programs within them. And they can copy them. It's

1 harder to try to go back and figure out, well, which  
2 lines of code should I show SNMP.

3           And by the way, do you think we're going to  
4 agree on that? We can't agree on the most basic stuff.  
5 We will be in here every week trying to argue that  
6 they're not producing enough. That even happens in some  
7 of their cases.

8           So they haven't done what the -- the cases that  
9 they cite litigants did. And, moreover, in this  
10 district, it is crystal clear. We don't have to prove  
11 our case to get discovery. If they want to claim our  
12 software is not registered, sobeit. They will get  
13 all -- we will do a simultaneous exchange. They can  
14 spend time on that. That defense will go away very  
15 quickly, I can tell you, when this thing they're trying  
16 to -- this trick they're trying to employ where we have  
17 to produce ours and they can, like, decide what  
18 percentage of the code to produce.

19           If you rule against that, I think this whole  
20 argument about registration is going to be gone. And  
21 I'll show you why. If you have the Complaint, I  
22 can -- I think I can explain what they're doing, but  
23 they're really cagey about it. So I may get it  
24 partially wrong. But I think I got the gist of it.

25           And if you turn to the Complaint, page 7 --

1 just let me know when you're there.

2 THE COURT: I'm there.

3 MR. ASHLEY: So, paragraph 33 -- and, by the  
4 way, it's the Complaint's allegations that govern, not  
5 their defenses.

6 But they claim that there was an admission by  
7 us that our software is not registered, the software  
8 that's at issue in this case. There was not.

9 They're -- they're -- and they never quote it, by the  
10 way. And you might -- you might notice that we asked  
11 that the meet-and-confer calls be transcribed. In one  
12 of the exhibits, there is dialogue between Ms. Weber and  
13 people over there saying, "We want it transcribed. We  
14 keep having these misunderstandings." They said, "No,  
15 we won't do it." That was in July. That's when the  
16 admissions supposedly occurred. And they don't quote it  
17 as an admission.

18 But what matters is paragraph 33, "SNMP  
19 Research has registered the copyrights for the software  
20 at issue in this case collectively," and then it sets  
21 forth.

22 I'm not going to spend an inordinate amount of  
23 time on this, but it does bear looking at this product  
24 list. You see this product? This is the software. And  
25 you'll see it says Version, like Version 15. 15.2,

1       15.3, 15.4, 16, and so on.

2           So the way it works is: The 15 and the 16,  
3 those whole digits, those are effectively -- and people  
4 use different terminology, but they're releases. It's  
5 like a product -- I mean, you know, it's a release  
6 and/or you can call it a version. It's a major release.  
7 16, 15.

8           Then you have a dot and you have another one.  
9 This is -- and this is SNMP's designation. Not  
10 everybody does it like that. I don't want to convey  
11 that. But SNMP's designation throughout its existence  
12 has been that that first number is the major release;  
13 next one is the minor release.

14           But there is other ones, too. So you can get  
15 up to four. So, but, like, you'd have -- and I'm making  
16 this up. I don't know if there is one of these  
17 versions, but you can have a 13.2.1.6.

18           And I may have this wrong, but I know the major  
19 is the first, the minor release is the second, and the  
20 other ones are, like, patches and bug fixes and  
21 revisions. They're minor.

22           And so what happens is -- the way it happens  
23 from a copyright registration perspective is: You know,  
24 16.2 will encompass all the stuff before it because  
25 you're just putting in more files. That's all you're

1 doing is putting in more files. And if you have a  
2 16.2.0, you have a bug fix one, maybe three bug fixes,  
3 three. You might even do them in a week. You don't  
4 register each of those separately. Nobody does, hardly.

5 What Jeff does is: He just -- or Dr. Case does  
6 is: He -- if it's not -- if it's -- if it's 16.2 and  
7 then it's, like, 16.2.0.1, some of the stuff that wasn't  
8 in 16.2 will just get wrapped into 16.3. Or if there  
9 isn't a 16.3, it will go to 17. That's what happens.

10 We'll show that if they want us to. John would  
11 have told them that. So when they say, like, in  
12 their -- I think one lawyer says it in a declaration,  
13 but I think the other one says it in a brief. They say  
14 something like, "Oh, there is an admission that..."  
15 They leave out all this.

16 What they want to do, I think, and I'm not  
17 sure -- what they want to do is: They want to say one  
18 of the versions that we sent was 16.2.0.9. Major 16,  
19 minor release 2, 0 revisions, bug 9. And Dr. Case is  
20 probably cringing as I'm probably getting this wrong.  
21 I'm just getting you the point of it, the gist of it.

22 They got and have said they were using that.  
23 Now, they may have been using others as well. We're not  
24 going to take their word for what they're using. And I  
25 think what they want to do is say -- they keep asking

1 you, "Oh, you should just make them define SNMP software  
2 as to what's on Table 1."

3 Well, then, they can take it back and go, "Hmm,  
4 we have no responsive documents." Table 1 doesn't say  
5 16.2.0.9. Or they want to say, "Okay. It's what's  
6 registered." They take it back, get into the conference  
7 room, "What does registration mean according to us? We  
8 believe that's not registered, despite what Mr. Ashley  
9 just said. We will produce nothing or we produce what  
10 we want."

11 They can make all these arguments after we do  
12 our simultaneous production. They can make them all.  
13 But none of them should mean they don't have to produce  
14 the source code in the products that we actually allege  
15 in the Complaint. All of it. They should have to  
16 produce all of that.

17 I'm going to get, in a moment, to what they  
18 should be doing to find other products, including stuff  
19 after the Complaint. But at least the stuff in the  
20 Complaint, there should be no issue. That's why we  
21 offered this compromise. Let's start with that. Then  
22 we could have been reviewing source code for the past,  
23 you know, ten months and fighting about what other  
24 products they have to identify.

25 You know, when you're taking depositions and

1 finding out whether or not things that are being  
2 represented are accurate, there is going to be  
3 additional stuff that has to be produced, most likely.

4 So that the argument on that it's not  
5 registered is -- that's a merits-based argument, and  
6 they should have no problem doing a simultaneous  
7 exchange if that's their concern.

8 But they have other roadblocks, too. They say  
9 they can't tell us which source codes and which products  
10 have the source code. Well, we've told them. We've  
11 alleged them. So they should have to produce them.  
12 It's not burdensome for them to do so. If they have  
13 nothing to hide, it shouldn't be a problem.

14 Also, they had no problem finding it in the  
15 pre-suit discussions, and they say, "Oh, well, you  
16 shouldn't really consider that because," you know, "no  
17 lawsuit had been filed yet." That's exactly why you  
18 should consider it.

19 Just like when you're trying to see -- when the  
20 parties are fighting about what do the -- what does this  
21 term of the contract mean to us; right? What does that  
22 mean? Do you pay more attention to what they're saying  
23 when outside counsel is arguing in litigation or what  
24 they said before?

25 So they can find it. There is tools. There is

1 commercial tools that you run to find searches -- I  
2 mean, to search for similar code.

3 And just so you know, our code is supposed to  
4 have in it copyright SNMP. It's embedded in this, in  
5 the source code. They're supposed to keep it in there.

6 Now, the reason why we're not saying just  
7 search for that is: They might not have it. And that  
8 wouldn't be an excuse not to produce; right? You can't  
9 take out the copyright designation and then not produce  
10 the code itself if it's not exactly identical.

11 So I think what they're trying to do is split a  
12 bunch of hairs. I think they know exactly what we're  
13 asking for. They knew it before and they know it now,  
14 and what they're trying to do is create ambiguity so  
15 they simply don't have to produce the source code in the  
16 products we have accused based on their admissions so  
17 that we can't do a comparison and show copying, which  
18 I'm sure we will.

19 And I think if you ordered the production of  
20 the source code in the products accused in the  
21 Complaint -- and we'll talk about the rest later -- some  
22 of this will go away very quickly because we will be  
23 able to look at it. And they can look at our copyright  
24 registrations and make any arguments they want. That's  
25 their right.

1           So, not deterred. They also say they're too  
2 secret. The source code is too secret. We told the  
3 Court this is going to involve a lot of source code  
4 review. It's not too secret.

5           I don't know if you've seen the protective  
6 order in this case. It's Docket 93. The key pages for  
7 source code are pages 9 through 10 and 18 through 24.  
8 It is a very robust protection.

9           Just to give you an example, the computers are  
10 set up in their attorneys' offices. They can't be  
11 connected to the network. They can actually monitor the  
12 in-person review. There is very few people that can  
13 view it. Like, if it's an expert, you have to disclose  
14 the expert in advance. They get to see if it's a  
15 competitor.

16           And Dr. Jeff is not -- Dr. Case is not selling  
17 switches. I'm not trying to compete with Broadcom.  
18 He's certainly not trying to find out their secrets.  
19 He's certainly not trying to find out any secrets on his  
20 own code. And he -- and he couldn't review anything  
21 unless he actually authored it, or the company, you  
22 know, SNMP authored it, and we, of course, should be  
23 able to see our own code.

24           But there is extremely robust protections. And  
25 you know what? They haven't put in a single affidavit

1 or even argued in a brief what's missing.

2 We negotiated that protective order for seven  
3 months. You might remember, in your prior order, you  
4 were talking about the protective order. It was  
5 not -- it wasn't entered until six months later, and you  
6 know we aren't going slow. Every accusation is that  
7 we're trying to move this fast, trying to be careful but  
8 move it fast. So we know who slowed it down. But it  
9 was a very extensive negotiation. And you should know  
10 we gave a lot. We just wanted the source code. So we  
11 gave and gave and gave on these negotiations, and now we  
12 hear, "Oh, source code? That's too secret."

13 And, by the way, once again, the cases they  
14 cite, there is declarations talking about why it's  
15 literally the lynchpin of their entire company, that  
16 this particular code -- one of them involved, like, the  
17 Google search engine. They didn't put in any  
18 declarations.

19 I've already told you that the cases they cite  
20 are largely -- are, I think, universally irrelevant.  
21 There is one case that's very relevant that we cited,  
22 and that's Brocade, when it was suing for copyright  
23 infringement over software, its software, and it sued  
24 A10 in its home district, Northern District of  
25 California, Brocade's, and it was before Judge Lucy Koh

1 at the Northern District and on her way up to the Ninth  
2 Circuit.

3 And I don't know if this was one that we had to  
4 cite a docket in that case, but it's a decision you  
5 should definitely reread. It's Docket 86. And the key  
6 pages -- yeah, we can hand it up to you, but -- can I  
7 enter the well?

8 THE COURT: You may.

9 MR. ASHLEY: It's very thick. Most of it is  
10 not that relevant.

11 I'm not going to quote it for you, but you can  
12 flip, if you want, to page 51. Basically there is a  
13 dialogue occurring where -- there was also a trade  
14 secret involved in that case, Your Honor, and so they  
15 had a trade secret claim, a patent claim, and a  
16 copyright infringement claim.

17 And reading on, Judge Koh said if something is  
18 only with respect to the trade secret claim, that  
19 doesn't have to be produced right now, right away,  
20 source code, because first you have to delineate the  
21 trade secrets. And then you don't want the plaintiff to  
22 be able to look at the code to make the trade secrets.  
23 But she said, for the copyright claim, produce now.

24 And the defendant in that case was trying to do  
25 just what they're trying to do now. "I don't" -- "I

1 can't produce the whole" -- "I'm not going to produce  
2 all the code for the product. That would be  
3 burdensome." And Judge Koh said, "Patent." And they  
4 didn't have any answer, any affidavit. And, of course,  
5 it's not true. And then they wanted to pick and choose,  
6 but, "Okay. If you're not going to produce it for the  
7 product, then what are you going to do?" "Oh, we'll" --  
8 "They're claiming that we're infringing their copyright  
9 code. I'll look at their code and I'll look at the  
10 stuff that might look like it and I'll give it to them.  
11 But," you know, "I'll deny infringement."

12 And then Judge Koh said -- this is at page 51,  
13 4 through 10, "I've never heard that the defendant gets  
14 to pick and choose what files of the source code they  
15 want to produce because based on their own opinion, they  
16 feel like these particular files are the only ones that  
17 are relevant to the plaintiff's patent case or copyright  
18 case." Remember, the answer is different for trade  
19 secrets.

20 Mr. Marino, who is Brocade's counsel, "I don't  
21 think I can take their word for it." The Court  
22 overruled -- overrules the objection.

23 And we can't take their word for it and the  
24 Court shouldn't take their word for it. And we're not  
25 asking them to take our word for what's on deposit for

1 the Copyright Office. We're saying simultaneous  
2 exchange.

3 And I think later in this when Judge Koh  
4 realizes that the trade secret's in the actual source  
5 code, they do a simultaneous exchange. That's what  
6 Brocade suggests. "Okay. Then, fine, we'll do a  
7 simultaneous exchange." Exactly what we're suggesting  
8 about.

9 Let's remember again where you begin with in a  
10 discovery dispute is: Is there a privilege? Is there a  
11 work product? In any of the broad view of relevance,  
12 it's clearly relevant. It's relevant, but the "it,"  
13 it's kind of -- it might encompass a few other things.  
14 Well, fine. Then we're going to have a much harder  
15 source code review. But it's relevant.

16 And then on burdensome, you're supposed to put  
17 in -- it's crystal clear. They know this rule. They  
18 keep talking about how many times we've moved. They  
19 know the law. It is the party claiming burdensome,  
20 undue burden, or disproportionality has the obligation  
21 to put in evidence or affidavits, make a showing. You  
22 can't just say it. And they haven't done that. And so  
23 that should end the issue.

24 So I now want to talk about the compromises.  
25 So our compromise from the beginning on all this was,

1       "You produce the code at the very least to start with in  
2       the products we've identified in the Complaint as  
3       at-issue products. We'll produce everything" -- you  
4       want our code? Tell us what code you want. Do you want  
5       the code? Tell us everything. We'll do it  
6       simultaneous."

7                   So let's talk about their compromise. Their  
8       compromise, which I alluded to earlier was, no, we have  
9       to give them all of our code. So that's what they have  
10      requested; right?

11                  Oh, I should also note we've requested the code  
12      of the very first instance. Like, literally, probably  
13      on the first week you could actually propound the  
14      request, we asked for it because we needed to start  
15      reviewing it.

16                  Their requests came, I think, nine months, a  
17      year later. Now, part of that can be explained, Your  
18      Honor, for instance, by them saying, "Well, we had told  
19      them it will not be" -- "We will not claim it's a waiver  
20      of" -- "of jurisdictional arguments or venue arguments."  
21      So that's not the excuse. But they might have been  
22      waiting on your ruling. So -- to propound the official  
23      requests; right? We had already offered it. You don't  
24      even have to request it. We'll do it.

25                  But you issued your ruling in June. There is

1 no immediate request from Extreme. It comes, like, a  
2 month, month-and-a-half later.

3                   Broadcom doesn't ask for our code for, like,  
4 four or five months after -- they were saying the whole  
5 time, "We can't do it because, gosh, it's so unfair that  
6 plaintiff wants to proceed with discovery, but we  
7 can't" -- the offer was always on the table. But then  
8 you had asked for it. But they're saying in their  
9 compromise, they go first. We have to give them our  
10 code. That's what they're requesting because -- in  
11 front of us, and then we don't get what we want.

12                  What they say we get -- Brocade says, "We'll  
13 give you back the code that you sent us as part of the  
14 license if we have it." "If we have it." Why do they  
15 say "if we have it"? Do you have it or not?

16                  And Extreme says something along the lines of,  
17 "Uh, us, too." You know, "Whatever we got from Brocade,  
18 we'll give you."

19                  But we don't want -- we know what code we gave  
20 them. We want the code that's in the products. And you  
21 can bet come trial time, they're not going to say that's  
22 sufficient if we prove that they have what we gave them.  
23 What we prove is that they used or substantially  
24 copied -- you know, they copied -- it doesn't have to be  
25 identical. They copied our code. And I don't care

1 which version it is. If it's copyrighted, it's  
2 copyright infringement.

3 So their compromise is not a compromise at all.  
4 They want to offer the words because we said the words.  
5 So I don't think you should be duped into that being a  
6 true compromise. It truly is not.

7 And they really should not have anything to  
8 hide here if there was no copying. They will be able  
9 to -- they will be able to prove us wrong or we won't  
10 make our burden.

11 And I'm just going to touch on a related issue.  
12 You probably saw references to build environment and  
13 install images. And I think their first argument is,  
14 "We don't even know what those are." It is absurd that  
15 Broadcom or Extreme would say, "We don't know what a  
16 build environment or an install image is." In fact,  
17 they end up citing cases later saying, "Oh, yeah. We're  
18 not going to allow a build environment because in that  
19 case, it wasn't worth the cost." And sometimes it's  
20 not. I'll give you an example based by cases.

21 There are patent cases, and sometimes in a  
22 patent case, there is source code that's at issue. But  
23 in a patent case, you're not -- you're not comparing for  
24 copying; you're accusing instrumentalities. And  
25 sometimes what the plaintiff wants is: It'll make my

1 life easier in proving what it does by doing the build  
2 environment.

3 And so the Court says, no, it's not that  
4 important. And in their cases they cite, there is a  
5 technical expert that comes in and says -- from the  
6 defendants -- says, "This is an undue burden and there  
7 is no payoff because..."

8 But, here, they haven't put any evidence of an  
9 undue burden. And so I'll tell you what the build  
10 environment is. Why is the source code not enough for  
11 the product? Because what can happen is: You can have  
12 a source code tree that -- that beads multiple products;  
13 okay?

14 So when they produce us -- if you ordered them  
15 to produce the source code for all the products that are  
16 accused in the Complaint and they did, and then we went  
17 back with our experts and we proved, oh, there is  
18 copying; here is the substantially-similar parts, you  
19 know, from over here and there and there in this folder  
20 and that folder. We lay it out. You could see Brocade  
21 or Broadcom or Extreme saying, "You didn't prove it's in  
22 the product. That could have gone in other products or  
23 not accused products that have not been used. We just  
24 gave you the full source code tree. You want the full  
25 source code tree? You got it."

1           So the build environment basically is -- I'm  
2 probably going to get this a little wrong. It's  
3 basically a set of instructions, essentially software,  
4 and they're followed to take the human readable source  
5 code and turn it into the actual software program that  
6 runs on the finished product. So when you have it, it's  
7 a big part of the complete picture of what portion of  
8 that code is in the product and how.

9           And the install image is sort of created from  
10 the build environment. Almost -- I don't know if you  
11 want to call it, like, the release, or some sort of  
12 a -- basically what it does is: It's the actual object  
13 code, the binary code. It's a depiction of it. It's a  
14 depiction of it saying this is what's in that product  
15 and it goes out with every product. It's for the  
16 install.

17           And when I say it goes out, I mean, it's  
18 probably, like, downloaded, or, you know, in a link or  
19 something, but -- or already included. But the point  
20 is: They have the install image for every single  
21 product. It's not burdensome for them to produce it.  
22 It's not super sensitive. It goes to the customers.  
23 And those two pieces help us determine, like, complete  
24 the puzzle where we have, okay, give us the source code  
25 for the product. We can compare that source code with

1 our source code. They can do the same. Everybody gets  
2 to do it. We'll show copying. We have the build  
3 environment and we have the install image. Now we can  
4 prove it's in the product.

5 Oh, by the way, I'm not just claiming the  
6 admissions we have, but we want to do the work, all the  
7 work, to make the case.

8 And they never really -- I mean, the fact that  
9 they're saying, "I don't know what this means," or, "We  
10 can't explain it," I mean, we are -- we were shocked.  
11 Really? That's Broadcom? This is your -- I mean, a  
12 highly-technical company, and you don't know what an  
13 install image or a build environment is? You're citing  
14 cases using those terms.

15 And we always feel like if we try to define it,  
16 it's going to be twisted against us. We asked the  
17 question. They have to answer it under oath,  
18 eventually, I hope, and I think once you order it, maybe  
19 some of the game playing will stop.

20 Once again, though, we offered a compromise.  
21 We said, "It's not our goal to create more work for us.  
22 Dr. Case is not looking to outspend Broadcom and  
23 Extreme. If you will tell us when you produce the  
24 code" -- I mean, "when you produce the source code tree,  
25 if you'll tell us" -- okay? -- "and the Court that's the

1 complete code for the product and all that went in it,  
2 then we don't need the build environment."

3           They should still have to produce the install  
4 images because those just go out with the products. But  
5 we don't need the build environment if you'll do that  
6 because then they just can't say later we didn't make  
7 our burden of taking the code, the software, and doing  
8 the comparison but somehow not prove that that copied  
9 portion was in the product.

10           But -- and they don't have to agree to what we  
11 suggested. But if they don't, then they would have to  
12 show it's burdensome to do -- unduly burdensome to do  
13 what we're asking, and they haven't. And it's  
14 undeniably relevant, and they know what we're talking  
15 about, and I hope you understand it now.

16           Now, up until now, I've been focusing on  
17 the product. To me, what I call the low-hanging fruit.  
18 This is the easy ones. It's what they admitted before  
19 the Complaint. You don't even get that in a copyright  
20 case, usually.

21           But on top of that, you know, we have it in  
22 writing, and we can allege it under Rule 11 and then  
23 some, and those are easy. Like, they should have to  
24 produce all that. So I think that's the bare minimum of  
25 what we're requesting from you today is: Produce that,

1 and we'll simultaneously produce our code and we can get  
2 to work; all the parties can get to work.

3 We're still going to have to decide this issue  
4 of, well, why do we have to rely solely on what they  
5 said pre-suit? Like, what if they give us the wrong  
6 letter in one of their e-mails on the product, or there  
7 is another one. They know what's in their line. Their  
8 engineers know exactly where they get their software.  
9 And so we asked the question under oath, "Are there any?  
10 List them all." And they say, "We just" -- "It's too  
11 confusing because" -- this is the key rogs,  
12 Interrogatories 1 and 2 for all the defendants. And  
13 Rog -- I'm just paraphrasing. Rog 1 is basically saying  
14 tell us all of your products that have SNMP software and  
15 then give us all the information, the release and  
16 version number and whatnot.

17 And one of my colleagues will be talking about  
18 the details of that. But at a high level, it tells us  
19 what you're using. I mean, which products are using our  
20 software under oath. And then tell us which people  
21 helped you answer that question so we can depose them.

22 Rog 1 is -- and then Rog 2 talks about partner  
23 products because the way some of these companies work  
24 is: They might sell a product themselves, but they  
25 might also have it sold through an OEM, you know,

1 another entity that -- like, it could be a Hitachi or  
2 somebody. It's the same product. We re-branded it. We  
3 want to know who has got our software out there and how  
4 much was sold.

5 They say they can't answer it because they're  
6 very confused and it's overbroad and unduly burdensome,  
7 the definition of SNMP software. You saw it all through  
8 there. And it literally pervades almost the entirety of  
9 discovery.

10 And you could imagine, it's not easy to get  
11 perfect agreement between parties on something like  
12 this. And I think the concern of defendants is, "Oh,  
13 well, then we're admitting that we did something."  
14 Well, that's kind of what we want. And you have to --  
15 you have to admit what's true if it's true. And  
16 sometimes you don't want to, but we're allowed to frame  
17 our requests the way we want to, as long as they're --  
18 as long as they're reasonable and they're  
19 understandable.

20 And this is not about lack of understanding.  
21 I'll read you -- I took you through all those e-mails at  
22 the beginning of this. And here is the definition:  
23 SNMP -- and I'm not putting all the other caveats. But  
24 SNMP software means any of the following: One, software  
25 provided by SNMP Research to Brocade; two, software

1 licensed by SNMP Research to Brocade; or, three, any  
2 software created by SNMP Research which is or was in the  
3 possession of whoever.

4 That way if they try to claim, "I don't know  
5 what was licensed," or, "Was it truly licensed," if they  
6 have it, then identify it.

7 And that's not just if they have the exact  
8 replica of the Version 16.2.0.9. It is -- they know if  
9 they're using parts of our software. And if they want  
10 to deny it, they should do it under oath.

11 But this is a reasonable definition. Now, they  
12 say, "Oh, gosh, we have to search 150 entities." They  
13 put in a one-sentence declaration, one -- I think it was  
14 Mr. Blum, one sentence that says words to the effect,  
15 "We have 150 subsidiaries." Not, "We don't know which  
16 ones are doing what." In fact, you'll see repeatedly  
17 throughout their brief, they say, "Virtually none of  
18 which had anything to do with this case." So, fine. Do  
19 the ones that do have something to do with this case.  
20 Search. You're the ultimate parent.

21 Remember that very first letter I showed you  
22 where when they were asking for a license, they were so  
23 cagey on our affiliates? They used defined terms. So  
24 we don't want to be tricked. We want to know the full  
25 scope.

1           And, you know, we tried -- like, for instance,  
2 with Brocade, we said, "Oh, we know there is a prior  
3 license or a current license," so we excluded that. If  
4 you read the definition of SNMP's software, we said, "We  
5 don't want that. That's the last thing we want is stuff  
6 about" -- and if they have another contract they want to  
7 exclude, that's how you work these out. You say, "Oh,  
8 this is going to encompass other stuff."

9           But the notion that Broadcom has to go back and  
10 go, "Wow, let's go through all 150 entities and figure  
11 out what they're selling. I have no clue where our  
12 product line is that we mentioned prior to this suit,"  
13 is not -- it's just not plausible. They know. They're  
14 dodging. That's why they're doing it.

15           And when they say, "Oh, we want to tie it to a  
16 table or a copyright," that's the way they want to do it  
17 so they can do some internal machinations and then not  
18 produce.

19           So Broadcom is a little more complicated  
20 because we're going beyond -- right? -- the products in  
21 the Complaint. They certainly should -- if you look at  
22 the answer, we had a -- we had a -- we tried to work out  
23 a deal where we said, "Okay." You know, "You can't find  
24 them. So at least for the universe in the Complaint  
25 that are identified, let us know." And all they did

1 was, they rewrote what was in the Complaint and said,  
2 "We don't have anything," which is not really what we  
3 wanted. But their claim is, "Well, because we don't  
4 know if it's registered." Well, so, fine. This is what  
5 we told them a year ago. Then we'll give you what's on  
6 register two simultaneously with your production of the  
7 code for the products that are already in the Complaint  
8 because we're not going to take their word on anything  
9 for that. That's -- those are in this case to stay  
10 until they win on the merits.

11           But for the other stuff, if you -- if you think  
12 you need our code, then sobeit. Why wouldn't they have  
13 taken us up on that? They say, "Oh, well, we have to  
14 know and understand." They don't have to know or  
15 understand anything. They'll have that defense. We  
16 can't change it. It is or it isn't registered.

17           So, I don't want to say I don't want you to  
18 order Rog 1, I do. I want you to order Rogs 1 and 2,  
19 for them to answer it as crafted with our definition of  
20 SNMP software. But if you want to give them additional  
21 time so they can do their analysis after -- if you  
22 order, you know, a simultaneous exchange, that's fine  
23 with us. It's just that we're running out of time, you  
24 know, to have these iterations and back and forth.

25           If they really wanted to do that, they

1 shouldn't have done what they did in the delay. And I  
2 understand that we're not adding most of the stuff prior  
3 to your ruling, but a lot of this stuff could have -- we  
4 could have worked out a protective order. We said we  
5 wouldn't assert jurisdictional issues on source code. A  
6 lot of this could and should have been worked out.

7 So whenever they're proposing something, just  
8 remember, it usually takes a long time and the clock is  
9 running and there is this asymmetry of information.

10 Now, I talked mostly about source code and  
11 product identification, and -- and I'm going to talk  
12 very briefly, but my colleagues are going to go into  
13 more detail on it, what they're doing with these  
14 boilerplate and general objections. We briefed this is  
15 couple times because we had one -- one motion to compel  
16 that you -- they keep saying that you denied it. I  
17 think you denied it without -- with leave if we couldn't  
18 work it out in a meet and confer.

19 THE COURT: That is correct.

20 MR. ASHLEY: They somehow think they have won.  
21 They knew this law. I can't even -- they know the law  
22 within the district courts in the Sixth Circuit that  
23 says you don't do this. You don't just have a long list  
24 of general objections and then say, "I hereby  
25 incorporate them all by reference."

1           And if you do, you back off of that during the  
2 meet and confer. But they don't. And they're very  
3 sophisticated lawyers, and there is a reason why they  
4 don't is because they don't really want to resolve  
5 things. They want to have this -- why they don't want  
6 to respond to Ms. Weber's e-mails when she tries to  
7 state, "Here is what we've done and agreed to." They  
8 say, "We can't do that because we just can't bother  
9 with" -- "it's too adversarial."

10           But it just means they can always go back to  
11 another objection no matter what we do. We can't close  
12 the loop. And that's why when they say, "We're still  
13 meeting and conferring. We're still thinking about this  
14 a lot. Boy, they should have told us we had a motion,"  
15 they just want to run out the clock. And it's a perfect  
16 way to do it and it's in direct defiance of the law.

17           And I'll tell you a really laughable -- I don't  
18 know if they figured this out, but in Brocade and  
19 Broadcom's latest ones, they incorporate by reference  
20 the objections in the prior one.

21           Now, Broadcom takes out the one that Your Honor  
22 took care of in your ruling, but they still do leave in  
23 all the others. So, like, right now, as we sit here,  
24 the taxpayer privilege, which they take out of their  
25 current responses, gets embedded back in by

1 incorporating by reference all of the objections in the  
2 prior superceded responses. That's how laughable it is.  
3 You can't ever tie them down because of that. And it's  
4 directly in violation of the rules, and it's also in  
5 vi- -- they keep trying to justify this, but if you  
6 assert an objection, you're supposed to have a  
7 reasonable basis for it.

8           And, like, for instance, undue burden, and you  
9 should be able to say, "I am withholding documents based  
10 on that objection." They say, "Oh, we've told you what  
11 we're doing." No, they haven't. And the rule is clear.  
12 If you assert an objection, you can't just say without  
13 waiving. You have to say are you or are you not  
14 withholding documents. That lets us streamline the  
15 issues and know what we're fighting instead of a  
16 phantom. And it's part of the reason why we're here on  
17 all this stuff.

18           Believe me, we want to resolve these issues so  
19 we can get to work and get documents that we need and  
20 get source code that we need. And I think that should  
21 speak volumes because they don't want to reach that  
22 resolution. They are struggling not to reach a  
23 resolution.

24           And I will tell you, also, I believe that a  
25 case like this where there is no privilege asserted,

1 there is no work product protection asserted, nothing is  
2 hinging on that, what you're really looking at when  
3 somebody says it's irrelevant is, is it burdensome?  
4 Like, if you end up producing a few things that are  
5 irrelevant or many things that are irrelevant, it makes  
6 our life harder, but is it unduly burdensome for you to  
7 do it, to run the search, to have the extra custodian  
8 look; right? That's really what it comes down to, and  
9 they have completely failed that. They have utterly  
10 failed on meeting their burden of putting in an  
11 affidavit or explaining in detail why. How many  
12 custodians is it? How many of those 150 entities do you  
13 have to search? Do you not know? Nobody comes in --  
14 nobody comes in and says, "I don't know the answer. We  
15 can't tell."

16 And with that, I think that this -- this should  
17 be relatively easy, almost across the board. Other than  
18 the definitional terms, which I want you to understand  
19 that we're trying to work it out, but we're also trying  
20 not to get gamed where we don't get what we need.

21 So those are the issues I had planned on  
22 covering, and I'm happy -- if you'd like, I can tell you  
23 which -- which issues they pertain to by number in the  
24 two motions, if you'd like, or we could do that at the  
25 end, or maybe this is all you need. I just didn't want

1 to --

2 THE COURT: Maybe let's do that at the end.

3 MR. ASHLEY: At the end? Okay.

4 So, unless you have questions, I was planning  
5 on turning this over to my colleagues on some of the  
6 more discreet issues, but also still tracking what was  
7 in the motion papers.

8 THE COURT: You can turn it over to your  
9 colleagues at this time. Thank you.

10 MR. ASHLEY: Thank you, Your Honor.

11 (A discussion was had off the record amongst  
12 Mr. Neukom and Mr. Ashley.)

13 MR. NEUKOM: Good morning. I am --

14 THE COURT: Good morning.

15 MR. NEUKOM: Well, I am a colleague in the Bar  
16 with Mr. Ashley, but I'm not his colleague on this case.  
17 I had just one administrative question for the Court.

18 THE COURT: Yes, sir.

19 MR. NEUKOM: I confess that I thought this  
20 hearing was not going to go the duration, and now it  
21 appears it's going to go, and Ms. Demers and I have  
22 return flights. We have both signed a letter. We're  
23 aware of the rules around the use of phones in the  
24 courtroom. If it's okay with the Court, Ms. Demers may  
25 send a short e-mail on quiet mode just to make sure that

1 we reschedule our flights.

2 THE COURT: Yes.

3 MR. NEUKOM: Thank you. If we have an extra  
4 night in Knoxville, we've suffered worse fates than  
5 that, but thank you.

6 THE COURT: Thank you.

7 MR. WOOD: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. WOOD: John Wood.

10 So I wanted to cover a couple of issues.

11 Mr. Ashley mentioned Interrogatories Nos. 1 and 2, which  
12 are really pretty core to this case. And if you look at  
13 Brocade's response to the interrogatories, which is -- I  
14 believe it's 116-13 in there.

15 And so this -- this, in some ways, is the  
16 foundational question, and it should be pretty simple,  
17 but it's -- and has Your Honor found that? I don't want  
18 to start until you have it.

19 THE COURT: You gave me the docket number of  
20 116-13?

21 MR. WOOD: Yes. Is that right?

22 That should be their response -- their  
23 supplemental response to the first set of  
24 interrogatories.

25 MS. WEBER: Yes, it's Exhibit L to the --

1 MR. WOOD: Yes, it's Exhibit L to the Weber --

2 MS. WEBER: It's under seal, so I'll get the  
3 exhibit number.

4 MR. WOOD: I think the unsealed version is  
5 117 -- is it --

6 MS. WEBER: 118-3.

7 MR. WOOD: 118-3. Sorry about that.

8 THE COURT: I'm there.

9 MR. WOOD: Okay. So, this, as I said, was  
10 foundational. We're simply asking them to identify all  
11 products that contain or use SNMP Research software.  
12 And this is the same question we asked them pre-lawsuit.  
13 We need to know what products are using the software so  
14 we know what you need a license for, and then we'll  
15 figure out the terms of that license and how much it  
16 costs.

17 And they had no problem answering that question  
18 pre-lawsuit. And now, as Mr. Ashley said, what they  
19 have done in their answer -- if you turn over to page  
20 13. Starting on page 13, they have given us a table.  
21 Well, this is the same table that we gave them, which is  
22 in the Complaint, which is the table they gave us  
23 pre-lawsuit. So they have simply given it back to us.

24 But then they say in their response -- let me  
25 find that -- that they're not going to say any of these

1 products actually have SNMP Research software. And  
2 that's the whole point. We need to know if these are  
3 the products and if they have SNMP Research software.

4 So, as Mr. Ashley said, we proposed, "Why don't  
5 you just start with the ones you already know and we'll  
6 get started with that." They took that the wrong way,  
7 and they said, "You agreed we could just put this list,  
8 but we don't have to say they have SNMP Research  
9 software."

10 Well, that's not what we said at all. We still  
11 want to know which products have SNMP Research software.  
12 They should have to answer this question and they have  
13 avoided it.

14 And on page 13 above the charts, they say that  
15 they are -- it's kind of in the middle, "Brocade is  
16 limiting its response to the products identified in  
17 paragraph 64 of the Complaint." As I said, they're just  
18 giving us back the list we gave them. "And we'll  
19 provide specific identifying information. In so doing,  
20 Brocade does not concede that these products contain any  
21 SNMP Research software."

22 Well, they haven't answered the question. They  
23 either need to -- if they're really denying that -- and  
24 the reason they're denying it is, "Your definition is so  
25 confusing, we can't figure out what SNMP Research

1 software means." And that's at the core of a lot of  
2 their objections is this problem with SNMP Research  
3 software.

4 And what they want us to do is to define it as  
5 something very narrow so they can have a way to say,  
6 "Well, these products don't contain it." So we've just  
7 said, "It's any software you got from us. You know what  
8 that is." And we've even offered -- Broadcom has  
9 another license that has SNMP Research software, and in  
10 our defin- -- and we're aware of that, and the products  
11 that use that, it's a completely different entity, we  
12 believe.

13 The products -- the products that use that,  
14 they're properly licensed; so we excluded those. We  
15 said, "We're not talking about any of those products."  
16 And we offered them -- we said, "If you know of any  
17 other licenses where you're properly using SNMP Research  
18 software, we'll be glad to exclude those."

19 "What is the" -- "What is your problem?" They  
20 keep saying the problem is the definition. And we're  
21 just talking past each other because we know they know  
22 which products have SNMP Research software. They just  
23 keep saying our definition. "You have to narrow your  
24 definition." They say, "Narrow it to 16-2-09." Well,  
25 then if they put 16-3 in a product, they wouldn't have

1 to produce those products.

2 So it's sort of a -- a lot of their discovery  
3 is like a shell game. They want us to identify the very  
4 specific -- something very specific, and then say, "Ha,  
5 it's under a different one. You identified the wrong  
6 number," or, "You didn't identify it quite right."

7 And so that's why we've said, "If you have our  
8 software, tell us about it. If there is some burden  
9 with that, tell us what it is. If you have another  
10 license and we agree it's properly licensed, we'll  
11 exclude that." And we already did that with one. So we  
12 think they should have to answer this question.

13 And if you go to Interrogatory No. 2, I think  
14 it's very telling. Interrogatory No. 2 is asking  
15 for -- we call -- we call them partner products. And  
16 partner products are simply -- it's the same product you  
17 identified in Interrogatory No. 1, but it has a  
18 different label.

19 So, for example, IBM, we believe, ships some of  
20 these products, but they have a different number and  
21 they're called the IBM something. It's the same  
22 product. We believe it has our software. And so those  
23 are at issue in this case, too, because you've created  
24 the product; you're just selling it under another name.

25 So we don't want this to be a game of got-you

1 where we didn't identify the correct name, so,  
2 therefore, you don't tell us what's going on.

3 So if you look at their response to  
4 Interrogatory No. 2, which is on page 19, they  
5 don't -- they don't respond. They just say, "Brocade  
6 identified the products listed in paragraph 64 in its  
7 response to Interrogatory No. 1."

8 And it's -- and above that, they say the reason  
9 they're doing that is they're limiting its response to  
10 the products identified in paragraph 64, the list we  
11 gave them, in this action and we'll provide identifying  
12 information pursuant to our agreement.

13 So, it's exactly what they're doing to say,  
14 "Aha, we got you. We got you to agree to a certain set  
15 of products, so now we don't have to identify the ones  
16 that are labeled differently."

17 Well, this is -- this is the reason we had to  
18 ask the question broadly. They're going to come up here  
19 and say, "They need to limit their definitions." This  
20 is exactly why we can't limit our definitions because  
21 they haven't denied that they're shipping products under  
22 different labels. They're just saying, "You agreed that  
23 the list you gave us is the only list at issue in this  
24 case," which is not what we agreed. We just said,  
25 "Start with that." We weren't trying to limit

1      Interrogatory No. 2, but they're saying, "We got you.  
2      You agreed to this limit, so now there isn't anything to  
3      answer on Interrogatory No. 2 because it's outside of  
4      the limit."

5           So that's the problem. That's the problem  
6      we've been facing. And so then we go round and round.  
7      They say, "Well, you agreed." And we're like, "That's  
8      not what we agreed." And then they say, "You're going  
9      back on your agreement." We said, "No, that was just a  
10     start." We just wanted -- we couldn't even get off the  
11     ground. But then once we agreed to something, it gets  
12     used against us.

13        And I can show you that. The other big way  
14     they do this is with their entities, and Mr. Ashley hit  
15     on this, where they say, "Well, you need to identify the  
16     very specific entity that has the product." Well, how  
17     do we know those -- that's the entity that's actually  
18     using it? They switch product names -- I mean, they  
19     switch entity names. They say they have all these  
20     entities.

21        Our position is: You know exactly which entity  
22     are using these products and which ones are using SNMP  
23     Research software. You should have to tell us. This  
24     isn't a shell game where if we don't guess the right  
25     shell, we lose.

1           If there is no burden, you should have to tell  
2 us what the entity is. And if you look at Broadcom response 85, which -- let me find that one. It is --

4           Can I see the Broadcom folder there? Which  
5 number is that? I'm sorry. I meant the RFP, RFP 85,  
6 which is -- let me find that. It should be 116-14.

7           So we also said -- so we had such a dispute  
8 over these entities, we said, "Why don't you try  
9 answering some of these questions based on" -- and they  
10 suggested this -- "based on the entities actually named  
11 in the Complaint instead of also the affiliates?" And  
12 we agreed to that as a start; right? Let's get some  
13 answers here.

14           But then once we agreed to that, again, it  
15 became -- you can see requests for production No. 85.  
16 We said, "We'd like all the documents constituting the  
17 Brocade merger transaction identified at page 17 of  
18 Broadcom's 2017 Form 10-K."

19           So there is no question what we're talking  
20 about here. This is -- this is the merger that created  
21 this whole problem. Documents are clearly relevant.  
22 They haven't shown any burden.

23           Their response is -- if you turn over to the  
24 next -- the next page, "Broadcom construes the term  
25 'Broadcom' to refer to the specific entity named as a

1 defendant in this action, Broadcom, Inc. No responsive  
2 non-privileged documents exist as there is no 2017 Form  
3 10-K for Broadcom, Inc." So they're like, "Oh, we've  
4 got you again. You picked the wrong shell. You  
5 shouldn't have said" -- "You shouldn't have agreed to  
6 Broadcom, Inc. because what we're actually talking about  
7 here, it was a different entity at that time. We've  
8 changed entity names." So the entity in the merger was  
9 a different entity than the entity that exists now as  
10 the parent. And so since we named the wrong -- you  
11 don't get any documents. They're clearly relevant.  
12 It's the transaction that started all this. We want the  
13 documents.

14 So that's what's going on here when they're  
15 trying to get us to narrow the definitions. That's why  
16 we have the -- we're asking for Broadcom and all their  
17 affiliates because they know what it is. If there is a  
18 burden, they should have told us. They should have put  
19 it in an affidavit. Same thing with the definition of  
20 SNMP Research software. And if we can agree on those, I  
21 think that clears up a lot of these discovery issues.

22 I would say the other -- the other really big  
23 issue -- Mr. Ashley hit on this as well -- is they have  
24 actually agreed to answer a lot of these questions, and  
25 we've listed that in our papers. We have a category

1 that says they have actually agreed to answer these.

2 Now, especially for Brocade and Broadcom, they  
3 precede each one of those with about two pages of  
4 objections that also incorporate all of the general  
5 objections and also incorporate all of the objections  
6 from previous filings, and they say, "Subject to the  
7 objections, we're going to produce."

8 And so we ask them and say, "That's great,  
9 you're going to produce these documents. Are you  
10 withholding any documents based on your objections?"  
11 They won't tell us. So how do we -- and then they don't  
12 actually produce the documents.

13 Mr. Ashley said, "We don't have any e-mails.  
14 We don't have any financials. We don't have any source  
15 code. So are you actually withholding something based  
16 on this?" And they won't tell us if they are or aren't.

17 We don't know -- so we could argue about all  
18 these little terms that they object to. We could argue  
19 about the tax privilege that they say they can withhold  
20 on. We have no idea how that can apply. They won't  
21 take any of them out. They won't say they're not  
22 withholding based on these objections. We think they  
23 have to tell us either I'm producing everything you  
24 asked for or I'm withholding based on a specific  
25 objection. Then we can have a conversation with them.

1           But right now, we don't -- they just say,  
2 "Yeah, we've agreed to produce, but we're not telling  
3 you if we're withholding anything and we're not going to  
4 tell you when we're going to produce it."

5           So Extreme, for example, their last production  
6 was October 18th, over five months ago. So they're  
7 on -- they're doing a rolling production that's not  
8 rolling. It's just -- it's stuck. So we're not getting  
9 documents. We can't judge it that way. They won't tell  
10 us what's coming, and we think by the law that they have  
11 to.

12          So we could go through a lot of these specific  
13 objections on the specific terms. I guess our view in  
14 some way is that ship has sailed. We're running out of  
15 time. And if they wanted to withhold documents based on  
16 those objections, they needed to tell us so we could  
17 have already had that discussion, and that's why we  
18 think they shouldn't be able to withhold based on those  
19 objections anymore because it's too late. They need to  
20 produce what we asked for with our definitions.

21          So I had one other issue I think I had to  
22 cover, which is the identification of the people  
23 Mr. Ashley hit on.

24          If you go back to Brocade Interrogatory No. 7,  
25 so we've asked them to identify all of the people who

1       are involved in any searches for the code because we  
2       want -- we want to know what they did.

3               So when they finally do answer the question and  
4       say, "These are the products that have SNMP Research  
5       software," we want to know who did the search. We want  
6       to know who did the search before when they gave us the  
7       list. We've asked that question of both Brocade and  
8       Extreme.

9               And so their response, again, if you look at  
10      the bottom at the end of Interrogatory No. 7, it's the  
11      second to the last sentence, they say, "Given the  
12      parties' stipulation" -- and this is that we can just  
13      cite back to you the products you listed in your  
14      Complaint; we don't have to actually do a search -- "no  
15      search for products was necessary to respond to these  
16      interrogatories."

17               And we've met and conferred on this. We said,  
18      "Well, what about the search beforehand?" And their  
19      response was, "Well, are you" -- "are you going to limit  
20      this request to that search?" "No, we want to know all  
21      searches you did, the ones we know about and the ones we  
22      don't because of this" -- we under -- we're seeing a  
23      pattern. Let's get you to limit as to something you  
24      already know. We'll tell you about that, and then we  
25      don't have to tell you all this other stuff and we

1 can -- we can move on.

2 So this just seems very straightforward. They  
3 did a search before. They told us the products. They  
4 need to tell us who the people are. We really don't  
5 understand why that's an issue.

6 And I think Extreme's objection -- we don't  
7 have to turn there -- theirs was based on priv- -- they  
8 said, "We don't know of any non-privileged information."  
9 Well, identification of a person is not privileged.  
10 We're not asking for communications. We're just asking  
11 them to identify the people. If they want to assert  
12 privilege when we depose them, that's their prerogative,  
13 but we should be able to get the list of people that did  
14 the search, and then we can ask them whatever questions  
15 we want.

16 So I'm going to turn it over to the next  
17 person.

18 THE COURT: Okay.

19 MR. WOOD: Thank you.

20 MS. RICE: Good morning, Your Honor. What I  
21 have is a very small part of all this. I think a lot of  
22 it has been covered in general by Mr. Ashley and  
23 Mr. Wood, but my piece of this is to cover generally the  
24 plain terms that are objected to.

25 There are numerous, numerous plain terms,

1 meaning the terms that haven't been defined in our  
2 discovery requests that we initiated to the defendants,  
3 that have been objected to and that are leading to  
4 objections stating that the questions, whether it be a  
5 document request, an admission request, or an  
6 interrogatory, are vague and confusing and can't be  
7 responded to.

8                 For Brocade and Broadcom, there are over 170  
9 plain terms that have been objected to; everything  
10 from -- golly -- oh, "acquisition" to "agent" to "source  
11 code" to "version" of a software. There just -- there  
12 is a plethora. They're all quoted in their response.

13                 We've tried to work through those with the  
14 defendants, and there is a similar list, probably not as  
15 extensive for Extreme, but it's -- as my co-counsel have  
16 alluded to, when we don't have any indication of  
17 what -- whether documents or information are being  
18 withheld on the basis of an objection and we don't have  
19 responses -- although, they're promised on a rolling  
20 basis -- that allow us to make any discernment of that,  
21 we're really at a loss. We could really be here for  
22 hours trying to go through definitions of very common  
23 terms we've used.

24                 The case law in this district and beyond, Your  
25 Honor, is that discovery is not a game of semantics;

1       that the parties should use common sense and reason and  
2       apply ordinary meaning to terms.

3                  We've suggested that in our meet and confers.  
4       In that process, we were told we would receive  
5       supplemental responses. And we suggested use of the  
6       dictionary definition, or if you don't understand a term  
7       like "build environment," ask your engineers, and if you  
8       have a question, come back to us before you answer and  
9       we'll be happy to work through it with you further. We  
10      didn't get any follow-back that said, "We've looked at  
11      this term further," you know, "we've asked our  
12      engineers, let's talk about these terms further." We  
13      just got renewed responses with the same objections.

14                 We did get, of course, promise to make some  
15      rolling productions and we've received a few documents,  
16      but, again, we're in that same kind of dilemma where we  
17      really don't know whether any of these terms are at  
18      issue and how to go through the process at this point of  
19      negotiating every simple, common word that may be  
20      objected to by either of the defendants.

21                 We've spent hours on the phone. We've had  
22      multiple meet-and-confer calls since Your Honor's ruling  
23      last June, and at this point, as Mr. Wood said, in our  
24      perspective, the ship has, perhaps, sailed. We don't  
25      really have time to continue this back and forth that

1 takes several weeks to schedule a call, hours to  
2 complete a call.

3                   And, of course, in our calls, you know, we're  
4 all discussing things, but we can't -- we can't be on  
5 the phone long enough to discuss 170 plain terms, Your  
6 Honor. It's just not a workable situation. So we would  
7 ask that you strike those objections and order that  
8 discovery be produced.

9                   The other issue that I'd like to just briefly  
10 defer to -- or refer to is Extreme's -- the majority of  
11 Extreme's responses have been to reiterate their  
12 objections and say, "But we're still willing to meet and  
13 confer with you." Again, it's the cyclical process that  
14 Mr. Ashley has referred to. It's not workable.

15                  We've spent many, many months trying to work  
16 through it without a lot of success; really, without  
17 much success at all, and we're running out of time. So  
18 we need the Court's intervention.

19                  You know, I'm happy to get into the weeds on  
20 these individual terms, but, in a nutshell, Your Honor,  
21 that is part of our request.

22                  THE COURT: Thank you.

23                  MS. WEBER: Good afternoon, Your Honor.

24                  THE COURT: Good afternoon.

25                  MS. WEBER: I'd like to make -- I'll make a few

1 points as quickly as I can. I thank you all for your  
2 time.

3 Following up on just a note, given the recent  
4 productions from Brocade in the month-and-a-half leading  
5 up to this hearing, I'd like to say that Brocade so far  
6 has produced 292 documents. Broadcom has produced zero,  
7 and Extreme has produced 177 total documents.

8 One of the topics that I'll be addressing is  
9 identification of entities and the requests going to  
10 those.

11 Plaintiff seeks discovery into which Broadcom  
12 entities were involved in the 2017 transfer of SNMP  
13 source code to Extreme.

14 That same year, as Mr. Ashley said, only about  
15 a month before the transfer of SNMP source code to  
16 Extreme, Brocade requested consent from SNMP to assign  
17 the Brocade license. You know all that.

18 So identification of the Broadcom entities  
19 involved in this transfer to Extreme is relevant to  
20 numerous issues, including the scope of breach and  
21 infringement and Broadcom's participation in it.

22 And Broadcom's involvement also concerns this  
23 Court's personal jurisdiction over it, which is an issue  
24 currently pending before Judge Atchley.

25 Six months ago in a September meet-and-confer

1 call, when I asked which Broadcom entities were involved  
2 in the transfer of the data center division, Extreme  
3 stated that it was not a simple Jack versus Jane  
4 situation and that it involved a complex corporate  
5 family and so the entities could not be identified on  
6 the call.

7 Well, defendants in this case should by now  
8 well be able to describe which Broadcom entities were  
9 involved in the transfer of SNMP source code to Extreme.

10 And I'll just give you a few quick examples.  
11 If you go to Extreme Interrogatory 11 -- and I could  
12 just paraphrase it so we can make this go quicker,  
13 Identify all products responsive to Interrogatory 1 that  
14 were sold or transferred to Extreme. For each product,  
15 identify the entity from whom you obtained the product.

16 And Extreme objected that this request seeks  
17 information that may be held by Broadcom or Brocade.  
18 But which precise products were transferred to Extreme  
19 and from who is information that it should know.

20 It never claims it doesn't possess this  
21 information. Extreme could and should provide it, and  
22 it is, in fact, required to provide a full answer under  
23 Rule 33 under oath.

24 Then we have Extreme Interrogatory 14 which  
25 asks Extreme to describe Broadcom's involvement in the

1 transfer of SNMP Research's software that was or is in  
2 the possession of Brocade or Broadcom to Extreme,  
3 including the duration of Broadcom's involvement and the  
4 identity of persons involved and their roles. And,  
5 again, Extreme does not answer the question. It  
6 objected and said that seeks information that should be  
7 sought from Broadcom and that Extreme is not in a  
8 position to accurately or fully describe the levels,  
9 scope, or nature of the involvement of another party,  
10 including the duration of its involvement.

11           But as plaintiff has explained repeatedly  
12 during meet and confers, we only seek Extreme's own  
13 knowledge.

14           I'll walk you through one more. Interrogatory  
15 No. 15 asks Extreme to identify each individual who  
16 answered or contributed to any of the answers furnished  
17 to these interrogatories and to designate the number of  
18 each rog for which such person furnished information.

19           So I just went over Interrogatory Nos. 11 and  
20 14 for which Extreme says it doesn't have the  
21 information and we should ask Broadcom.

22           Well, in their response to No. 15, you see they  
23 identify seven different people who furnished facts and  
24 information for Interrogatories 2 through 4. 11 and 14  
25 are not even listed on there. Apparently, my read of

1 that is that they did not even attempt to get an answer  
2 about the identity of Broadcom's involvement and the  
3 nature, who was involved.

4 We also asked identical interrogatories of  
5 Broadcom and Brocade. Describe Broadcom's involvement  
6 in the transfer. Broadcom played a -- well, I shouldn't  
7 say "played." Broadcom answered in a way that my  
8 colleague spoke about. They construed the term  
9 "Broadcom" to mean only the named entity, the parent  
10 company, Broadcom, Inc., and said that the interrogatory  
11 was nonsensical because Broadcom, Inc. acquired Brocade  
12 after the transfer of plaintiffs' software to Extreme.

13 But that still doesn't answer the question  
14 about Broadcom's predecessor's involvement in the  
15 transfer, if any, and whether and to what degree other  
16 Broadcom entities were involved. Brocade did not answer  
17 the question either. So neither defendant has answered  
18 the question despite having the ability to do so.

19 I would point Your Honor to page 7 of Brocade  
20 and Broadcom's opposition brief. There they claim that  
21 discovery requests about specific predecessor's  
22 involvement in the conduct alleged could be proper.

23 But Interrogatory No. 15, which I just  
24 referenced, is not meaningfully different. It asked  
25 them to involve Broadcom's involvement in that transfer.

1 Broadcom and Brocade know what entities were involved  
2 and they should be required to provide that information.

3 Moreover, as Mr. Ashley mentioned on page 4 of  
4 the opposition brief, Brocade and Broadcom argued that  
5 of the 150 Broadcom, Inc. subsidiaries, virtually none  
6 have any relevance to do -- any relevance to this case.  
7 And so despite making that statement, they are still  
8 unable to describe Broadcom's involvement in the  
9 transfer, and that does not make sense. They have  
10 avoided taking a position on it, and they have a duty to  
11 do so and to supplement their response under Rule  
12 26(e)(1).

13 I'll go to the next issue, which is time frame,  
14 and I'll try to be brief about this. We -- plaintiff  
15 served discovery requests, and the -- we served them in  
16 2020. The time frame is January 1st, 2017, the year of  
17 the breach, to the present.

18 2017 is a critical year. I won't repeat what  
19 others have said. It's the year of breach and it's when  
20 the transfer of Extreme's -- of plaintiffs' software to  
21 Extreme occurred. It's also the date of the merger.

22 So SNMP seeks discovery after January 1st,  
23 2017, and two issues, such as the scope of breach,  
24 wilfulness, copyright infringement, personal  
25 jurisdiction, and damages.

1           It also attempts to account for potential  
2 defenses that defendants will assert, who will almost  
3 certainly seek to diminish the profits attributable to  
4 infringement. So we're entitled to a full, accurate  
5 accounting of the financial information related to  
6 profit margins, cost allocations, prior to the date of  
7 termination of the license agreement and after.

8           After the date of termination, they would have  
9 had every incentive to adjust how costs were allocated  
10 or how the profits looked because they knew at that  
11 point that they were still using plaintiffs' software  
12 but they no longer had a license to do so.

13           Brocade and Broadcom objected to the  
14 January 2017 time frame as overbroad, unduly burdensome,  
15 irrelevant, and not proportional to the needs of the  
16 case.

17           They would limit the time period, as Mr. Ashley  
18 said, to the date of the license termination, which is  
19 July 25th, 2019, to the date this lawsuit was filed.  
20 And they provided no explanation as to why discovery  
21 should be restricted to the date this lawsuit was filed  
22 and they do not persuasively explain why discovery  
23 dating back to 2017, the year of the breach, falls  
24 outside the extremely broad scope of discovery.

25           I'll just give a few examples. Brocade RFP 44

1 requests all materials concerning or discussing the use  
2 of our client's software and Brocade products. And that  
3 is undeniably relevant to damages and defendants'  
4 defense concerning what profits are attributable to  
5 infringement.

6 They, Brocade, objected to plain terms in that  
7 request, and then they unilaterally limited their  
8 production to after July 25th, 2019.

9 But pre-July 25th, 2019 discussions about the  
10 use of plaintiffs' software and Brocade's products is  
11 every bit as relevant to defendants' defense concerning  
12 profits attributable to infringement as discussions are  
13 after that date.

14 No matter when the discussions took place, they  
15 bear upon how defendants' products use SNMP, which will  
16 be relevant to their profits defense. And so Brocade  
17 should not be able to arbitrarily limit the date that it  
18 provides discovery to this request.

19 They also argue Brocade and Broadcom in their  
20 opposition that plaintiffs' source code requests -- and  
21 I can state them later, the specific numbers. But they  
22 say that they're overbroad because there is, quote, "no  
23 question" -- that's the opposition at 17, footnote 20 --  
24 "that Brocade's products incorporated plaintiffs'  
25 software prior to July 25th, 2019."

1           So that response, to me, just further  
2 demonstrates why plaintiffs are entitled to  
3 pre-July 25th, 2019 discovery of source code.

4           If there is no question that plaintiffs' source  
5 code was in these products prior to July 25th, then  
6 plaintiffs are entitled to compare that source code that  
7 they just admitted contained the products to post  
8 July -- or that product contains the source code,  
9 they're entitled to compare the code after July 25th to  
10 see the types of changes, if any, that were made. And  
11 this reinforces why plaintiffs need a full picture  
12 starting the year of Brocade's 2017 breach.

13           I also note that defendants' own time -- well,  
14 Brocade's own time frame in the discovery request they  
15 served on us is either no limit; so dating back 30 years  
16 to the inception of SNMP, or they have sought things  
17 that -- and I'm paraphrasing -- involve all  
18 communications concerning development, which would  
19 literally involve every single document that our company  
20 has, or January 1st, 2017 to present, which is our time  
21 frame.

22           I can go over a few more, but the -- in the  
23 interest of time, I guess I'll underscore, Broadcom and  
24 Brocade protests are requests seeking the identities of  
25 customers pre-July 25th, 2019 and the number of sales of

1 products of those customers.

2 Brocade Rog 5 and RFP 49 requests Brocade to  
3 identify their customers and the client of each product  
4 from January 21st, 2017 to present.

5 First, Brocade objects that the identities of  
6 its customers is private. But we have a protective  
7 order, and they have not explained why the protective  
8 order is insufficient to protect those identities.

9 They also protest that the identities of the  
10 customers who sell Brocade's products containing  
11 plaintiffs' software product prior to the date of the  
12 license termination is irrelevant to the breach of  
13 contract or copyright claims because Brocade had a  
14 license to use plaintiffs' software prior to that time.

15 Again, Brocade is just trying to artificially  
16 obstruct the scope of discovery. And one example is  
17 that -- of why we need this information is that Brocade  
18 has persistently said it will provide certain  
19 information if it exists. And if you do a search for  
20 that, you'll see it throughout the discovery responses.

21 For example, for this particular request, I  
22 believe it says it will provide business records to show  
23 the number of products sold after July 25th, 2019, "if  
24 any exist," and that is a quote from the Brocade  
25 opposition at 16.

1           It has also made other reservations repeatedly  
2 about what other discovery it may or may not produce,  
3 including the source code that we've sent them.

4           So, in part, because of these repeated  
5 reservations about what evidence is even still in  
6 existence, we need information from the customers to be  
7 able to cross-check what -- has Brocade made a full  
8 production; is it accurate.

9           Plaintiffs, I think, in large part, aside from  
10 that reservations issue, they deserve a  
11 historically-accurate picture of Brocade's revenues,  
12 allocations, and profit margins.

13           As I mentioned -- well, for one, we're also  
14 entitled to subpoena these customers to confirm whatever  
15 information and business records Brocade does actually  
16 produce, and what -- because I mentioned earlier, as you  
17 know, there is discussions and license negotiations in  
18 2018, 2019, and 2019, our client terminates Brocade's  
19 license and use rights. Brocade knew this was coming.  
20 So it did have every incentive to change the way it  
21 allocated costs and reported profit margins after that  
22 because it knew it was risking a copyright infringement  
23 suit.

24           So we are entitled to only a year-and-a-half of  
25 discovery prior to that time the license rights were

1 terminated so we can compare, do the financial  
2 calculations correspond to one another; are they  
3 consistent.

4 And Brocade has not provided any declaration  
5 presenting affidavit -- or presenting evidence showing  
6 that producing this information would be a burden.

7 I have two more that I'd like to get through  
8 quickly. One request -- or -- sorry -- one category of  
9 requests implicates third-party confidentiality.  
10 Brocade objects to almost all of the requests on  
11 third-party confidentiality grounds. And Broadcom  
12 similarly raises third-party confidentiality objections  
13 to all requests except one.

14 And one example of the language it uses is,  
15 "Broadcom objects to this request as it requires the  
16 disclosure of confidential and proprietary information,  
17 documents, and tangible things of Broadcom and third  
18 parties." That's the definition of a meaningless and  
19 boilerplate request objection.

20 One example where this objection occurs is  
21 Interrogatory No. 12 in the Brocade interrogatories, and  
22 this requests identification of all contracts between  
23 Brocade and all third parties to which Brocade has  
24 provided the products containing plaintiffs' software or  
25 provided the software itself. That's highly relevant.

1                   Brocade asserted burden, relevance, privacy,  
2 and confidentiality obligations to providing these  
3 underlying agreements. Again, it did not provide any  
4 sort of burden, proof of burden, or declaration  
5 supporting that.

6                   And moreover, the information is highly  
7 relevant for the reasons I just articulated. It's  
8 relevant to damages particularly because Brocade has  
9 indicated that it may not have existing admissible  
10 business records for certain requested information, and  
11 getting the contracts from third parties would  
12 enable -- or pertaining to third parties would enable  
13 plaintiffs to glean product pricing and the number of  
14 units sold and the timing and duration of these  
15 contracts so that it could then compare this information  
16 with Brocade's produced business records on the topic,  
17 if any.

18                  Brocade Interrogatory No. 9 asks Brocade to  
19 identify revenues and costs of any other products or  
20 services sold with or as a result of the purchase of  
21 products identified in response to Interrogatory No. 1.

22                  And we have explained on several  
23 meet-and-confer calls that this would encompass add-ons  
24 to products. Like, if you wanted to buy additional  
25 memory to go with the switch, that's a -- or that's an

1 additional product sold with the infringing products  
2 that we will want to include in our damages calculation.  
3 We're entitled to that information.

4           But Brocade objected to providing this, in  
5 part, because of third-party confidentiality grounds.  
6 And I'd just say that, again, SNMP is entitled to a full  
7 historical picture of the revenues and costs for the  
8 profits sold of the infringing products, which is  
9 relevant to the damages and the profits attributable to  
10 infringement.

11           I'd note that in corollary requests in the  
12 Extreme discovery requests, Extreme does not object on  
13 third-party confidentiality grounds. We asked for all  
14 distribution documents that can show the number of  
15 products identified in response to Rogs 1 and 2,  
16 distributed, transferred, or disclosed to third parties,  
17 including the name of the third party to whom the  
18 product was disclosed. And Extreme has indicated that  
19 it will provide that. Broadcom/Brocade can and should  
20 do the same.

21           And last, the topic I'll discuss is personal  
22 jurisdiction over Broadcom, Inc. It is the only party  
23 that is challenging personal jurisdiction. As I  
24 mentioned, Judge Atchley is presiding over that issue,  
25 the motion is still pending, and plaintiffs served

1 requests last January -- sorry --  
2 January -- December 2020 concerning personal  
3 jurisdiction because only a week prior, defendants had  
4 moved to dismiss or transfer the case on that basis.

5 In that motion, plaintiff cited authority  
6 showing that this Court has personal jurisdiction over  
7 Broadcom because Broadcom's own actions made it  
8 reasonably foreseeable that it would become involved in  
9 a dispute.

10 I think you're aware of it. The case is *Baker*  
11 *v. LeBoeuf*. It's a Sixth Circuit case, and it  
12 contemplates non-signatories being bound by an agreement  
13 that has an exclusive form flexion clause, which the  
14 Brocade license agreement has here, and it provides for  
15 exclusive venue and jurisdiction in Knox County.

16 Your Honor's June 25th order denying  
17 defendants' request to discovery states -- it  
18 specifically found that their participation in  
19 discovery, while the motions to dismiss are pending,  
20 will not be construed as a waiver of personal  
21 jurisdiction.

22 Accordingly, the defendants should have no  
23 problem responding to plaintiffs' request concerning  
24 personal jurisdiction to Broadcom.

25 And the requests that I went over previously

1 involving identification of entities and specifically  
2 Broadcom's involvement is one set of requests that's  
3 relevant to personal jurisdiction.

4 I'll mention a few more. Broadcom RFP 72,  
5 which requests all documents relating to Broadcom,  
6 Inc.'s review, awareness, or acknowledgment of the  
7 license agreement, which tracks the standard I just  
8 quoted to you or mentioned to you from *Baker v. LeBoeuf*,  
9 105 F.3d 1102, Sixth Circuit.

10 Broadcom responded with objections to plain  
11 terms, awareness and what acknowledgment means, and  
12 defined terms, and in a July 2021 phone call, we had  
13 asked Brocade if it was ready to substantively respond  
14 to the personal jurisdiction requests or whether we  
15 needed to discuss any of the definition -- or any of the  
16 objections to plain terms, and they said they're ready  
17 to respond, but that they would keep an open line of  
18 communication with us if there was any confusion. We  
19 never got any calls, but all the same objections are  
20 still in the supplemental responses.

21 The request is undeniably relevant to personal  
22 jurisdiction over Broadcom and whether its actions would  
23 have made it reasonably foreseeable that it would become  
24 involved in a dispute over a license agreement.

25 Broadcom RFP 71 requests all documents relating

1 to Broadcom, Inc.'s involvement, direct or indirect,  
2 with Brocade's development or sale of derivative works  
3 with respect to our client's software.

4           Broadcom again responded with objections to  
5 plain and defined terms. But this request, whether  
6 Broadcom, who did not have a license for this software,  
7 the request about whether they helped Brocade create  
8 durable works is plainly relevant to the issue of  
9 copyright infringement and Brocade's breach if it  
10 provided the source code to Broadcom.

11           I'm trying to wrap this up, but my last example  
12 will be Broadcom RFP 18 and Interrogatory 17 where we  
13 ask for all documents relating to whether Broadcom has  
14 ever acted as an agent for Brocade and where that  
15 occurred, which is, again, relevant to that standard  
16 that I quoted you previously from *Baker v. LeBoeuf*.

17           Broadcom objects on numerous grounds,  
18 including -- I think it's a prior objection, but it  
19 still explicitly incorporates it -- including because  
20 the Court has supposedly not ordered that plaintiffs are  
21 entitled to jurisdictional discovery and because the  
22 term "agent" is vague and undefined.

23           But that does not answer the question. Agent  
24 is a plainly understood term, meaning acting on behalf  
25 of, and defendants even use it in their own discovery

1 requests. They use it in the definition of the  
2 entities. And they can use their own understanding to  
3 respond to this one.

4 We served this request because Broadcom's  
5 agency and where it occurred, as I mentioned, informs  
6 the foreseeability of it being bound by the form  
7 selection clause in the license agreement.

8 And I note that in 2019, Broadcom, Inc. is the  
9 one that sent a letter to Extreme Networks and SNMP  
10 taking the position that the license was a type of  
11 contract that was material to the operation of the data  
12 center business sold to Extreme and that SNMP did not  
13 consent to a partial assignment of that license to  
14 Extreme.

15 Broadcom, Inc. sent that letter, it appears, on  
16 behalf of Brocade. In 2019 as well, a representative  
17 from Broadcom, Inc. was involved in negotiations with  
18 Dr. Case over a new license agreement.

19 It seems like both of those would potentially  
20 be responsive to this interrogatory and document  
21 request, but they were not listed.

22 Unless Your Honor has any other specific  
23 questions, I'll wrap it up.

24 THE COURT: I don't. Thank you.

25 MS. WEBER: Thank you.

1                   THE COURT: Mr. Neukom and Ms. Demers, were you  
2 able to reschedule your flight?

3                   I want to talk about scheduling a little bit.  
4 We need to take a break. The court reporter needs a  
5 break. I've got some things I have to do. So I need to  
6 know what the afternoon is going to look like.

7                   And I want to let you know, we're going to come  
8 up with a definition for the SNMP software before we  
9 leave today. So however long you all feel like that's  
10 going to take, we're going to do that.

11                  MR. NEUKOM: We are all for that, Your Honor.  
12 And thank you for asking about the accommodations.

13                  We were -- I'm the troublemaker. By the way,  
14 I'm the reason we're here a week or two later because I  
15 e-mailed with, I think, your clerk. Thank you for the  
16 reschedule. It allowed my wife and I to take our three  
17 kids to Disneyland, which was our first vacation in the  
18 COVID era. So I'm sorry to be the scheduling guy at  
19 every term.

20                  We've been rebooked. The rebooked flight has  
21 me getting home at about midnight and would allow us to  
22 stay until --

23                  THE COURT: What time do you need to leave the  
24 courthouse?

25                  MR. NEUKOM: That would have us leaving about

1 2:00. I would ask if it's possible, we're willing to --  
2 I think our side of the presentation from the Extreme  
3 side is going to be much, much shorter than what you've  
4 heard so far.

5 If it would be possible for us to skedaddle by  
6 1:00 or 1:15, I think we might be able to --

7 THE COURT: If you all can work out that  
8 definition. If not, we're going to stay here a while.

9 MR. NEUKOM: Okay. Well, we've got both  
10 flights booked. So if we could get out by 1:00 or 1:15,  
11 we can make our original flights, and if not, we'll just  
12 do the later ones.

13 THE COURT: Okay. We're going to talk about  
14 this offer or discussions that you all have had  
15 concerning at least the simultaneous exchange. We need  
16 to address that. So those are going to be the two  
17 primary things on the table.

18 I mean, I'll tell you right now, in looking at  
19 the responses, wilfully inadequate under the rule.  
20 Willfully.

21 So I'm going to listen, but I have -- what I  
22 have before me, I have no support for any -- to evaluate  
23 any arguments concerning why this would be burdensome.

24 So I've heard the relevance. So now it will be  
25 on you all to talk to me about the proportionality. But

1       we're sitting here today without anything to support  
2       that, really. So we need to get discovery going.

3                   MR. NEUKOM: Happy to address that. And I'm  
4       happy -- well, I was planning to let -- I represent the  
5       smallest defendant.

6                   THE COURT: We need to take a break. The court  
7       reporter needs a break.

8                   MR. NEUKOM: Okay.

9                   THE COURT: And so we're going to have to take  
10      some time. So you all tell me. Knowing you need to  
11      think about the definition, we have to get that done.

12                  So do you want to take an hour? Do you want to  
13      take 30 minutes? Or do you all want -- I would like for  
14      the parties to be able to do this. But I'm happy to sit  
15      here and work through the terms with you.

16                  Do you want to go try to get a bite of lunch  
17      for 30 minutes and then meet back for 30 minutes and see  
18      what you can work out? So there is a full hour. That  
19      will put us back at 1:00.

20                  MR. NEUKOM: That would. I would ask for  
21      30 minutes, if that doesn't -- I don't want to keep  
22      everybody too tight.

23                  But I also -- I have just one idea that I just  
24      want to put in the back of the Court's mind over lunch.

25                  THE COURT: Okay.

1                   MR. NEUKOM: We are also -- just to be clear,  
2 Ms. Demers and I represent Extreme Networks, the  
3 smallest defendant.

4                   THE COURT: Yes.

5                   MR. NEUKOM: We're the ones accused of  
6 having --

7                   THE COURT: Let me ask you, Ms. Plessman, do  
8 you have time restrictions?

9                   MS. PLESSMAN: Yes, Your Honor. My flight is  
10 at 3:00. But I'm happy to reschedule it. I want to  
11 give you as much time as you need.

12                  THE COURT: Well, I know scheduling flights is  
13 not an easy task these days either. So --

14                  MS. PLESSMAN: I don't know what's available  
15 later, but on a break, I'll check and see what I can  
16 find.

17                  MR. NEUKOM: So here was the idea I had: And  
18 this is by no means a joint proposal. This was my  
19 private jotting.

20                  For Extreme, not only are we the smallest  
21 defendant, but there also -- there is only copyright  
22 claims against Extreme. So I think we all need to  
23 confer about this.

24                  Because there are only copyright claims against  
25 Extreme, it is why Ms. Demers and I have been -- one

1      might say fetishistically focused on getting a copy of  
2      the actual registered asserted copyrighted works.

3            We've got a real chicken and egg situation  
4      where each side wants to show -- see the other's source  
5      code first or even simultaneous.

6            My proposal for all of us today and going  
7      forward would be as follows: Number one, we would ask  
8      for production of the eight registered copyrighted  
9      works, attorneys' eyes only, outside counsel only, so  
10     that Ms. Demers and my colleagues and I can review it.

11           Number two, we will commit to this Court that  
12    within 20 days of receiving that, we will come back to  
13    the defendant -- pardon me -- the plaintiff with an  
14    expected production.

15           Number three, I humbly submit, and I have not  
16    conferred with any of my colleagues in the Bar on this,  
17    we've got 482 discovery requests from the plaintiff, 64  
18    rogs, 255 RFPS, 164 RFAs, five motions to compel, and  
19    we're now two-plus hours into a motion to compel  
20    hearing.

21           I respectfully suggest that the parties retain  
22    a discovery master of the Court's choosing. The parties  
23    can work out between themselves how to pay for that  
24    master, and that master could do a couple of things.  
25    Number one, set the timing for these calls. Number two,

1 set the duration, and, number three, it would be the  
2 discovery master who would certify what is ripe for  
3 taking this Court's resources on a motion to compel.

4 I respectfully think that is a win-win for  
5 everybody; although, we have to pay the master fees.  
6 And when I say a win-win for everybody, it's for the  
7 Court as well so that we don't have multi multi-hour  
8 motion to compel hearings.

9 THE COURT: It's not that I haven't worked  
10 through cases like this before. I think we can work  
11 through this. But if you all want to have those  
12 discussions.

13 But given that we're running short on time, if  
14 you all want to talk about that, fine. Take 30 minutes.  
15 We're going to take the full hour. We'll be -- well,  
16 it's now short of that. It's 50 minutes. We'll be back  
17 here at 1:00 o'clock. Use the time how you wish.

18 Please work towards getting a definition and  
19 have further consultation about the source code because  
20 we need to work through that to get your discovery  
21 moving.

22 MR. NEUKOM: Thank you.

23 THE COURT: And then if you want to think about  
24 the responses, let me know. I think I can actually go  
25 ahead and rule on those. I will listen. I certainly

1 will. But just based on the rules, they are wilfully  
2 inadequate.

3 MR. NEUKOM: Thank you.

4 THE COURT: Okay. We'll take a recess until  
5 1:00.

6 THE COURTROOM DEPUTY: All rise. This  
7 honorable court stands in recess.

8 (A luncheon recess was taken at 12:11 p.m.)

9 **AFTERNOON SESSION**

10 (P.M.)

11 THE COURTROOM DEPUTY: All rise.

12 This court is again in session. Please come to  
13 order and be seated.

14 THE COURT: All right. Mr. Neukom. So my  
15 computer has gone to sleep during the break, so just one  
16 moment.

17 MR. NEUKOM: Thank you, Your Honor.

18 May it please the Court, John Neukom. With me  
19 is my colleague, Leslie Demers, for Defendant Extreme  
20 Networks.

21 We had some prepared thoughts and remarks,  
22 relatively short, but I thought I would try to  
23 streamline this a little bit in light of the guidance  
24 from the Court that we received before the lunch hour.

25 So, by our light, it's important to distinguish

1 what claims are being asserted against which parties.  
2 Extreme is, as I said, the smallest of the defendants.  
3 The only claims being asserted against us are copyright  
4 infringement. That is in reference to eight  
5 specifically-identified, allegedly-registered works and  
6 with respect to a handful of products, or I think  
7 product families, 11 of them.

8 I am going to --

9 THE COURT: The ones set out in paragraph 49 of  
10 the Complaint, those product families?

11 MR. NEUKOM: That's right. That's right.

12 Well, to be perfectly frank with Your Honor, I  
13 don't remember if it was paragraph 49. I'm trusting  
14 that the Court got that right.

15 So I'm going to shift in just a moment to the  
16 Court's suggested guidance of "let's get a definition of  
17 SNMP Research software," because I think once we get --  
18 at least from our position, if we were to get an  
19 agreed-upon definition of that, that would, in a  
20 flow-down way, resolve almost all disputes before this  
21 Court with respect to Extreme.

22 THE COURT: So are we going to focus on that?

23 MR. NEUKOM: Yeah, I think so. But before I do  
24 that, very briefly --

25 THE COURT: Oh, certainly.

1                   MR. NEUKOM: -- I wanted to -- I wanted to try  
2 to help explain to the Court why this issue has mattered  
3 and why what Extreme has been doing has not been  
4 stonewalling in any gamesmanship way.

5                   Ms. Demers and I are IP litigators. These are  
6 the kinds of cases that we handle. Although, this is my  
7 first time in Knoxville. By the way, it's a gorgeous  
8 courthouse. I invite you all to the Northern District  
9 of California.

10                  THE COURT: We welcome you all to the Eastern  
11 District of Tennessee as well.

12                  MR. NEUKOM: If you come to the federal  
13 courthouse in San Francisco, you'll see how jealous I  
14 am.

15                  We have struggled because -- well, you've heard  
16 some comments about the history of the dealings of the  
17 parties over time.

18                  As outside counsel for Extreme -- right? --  
19 it's our responsibility to evaluate a discovery request  
20 and figure out if it's fair, if it's proportional, if  
21 it's relevant, and what we should be producing or not.

22                  So that's the job that, as officers of the  
23 Court, Ms. Demers and I have. It's 18 months after this  
24 case has been filed. Again, against our client, the  
25 only claim asserted is copyright infringement, and as of

1 today, I still do not have my eyes on the asserted  
2 copyrighted works.

3 I've struggled with that. This is like  
4 asserting a copyright claim over a book but refusing to  
5 give the book to the defendant, or a picture, but giving  
6 a snippet or a piece of the picture and that's it.

7 Or I don't know if this Court has been burdened  
8 with patent litigation as much as we are in California,  
9 but this would be like asserting a patent claim but then  
10 refusing to show somebody what the patent is.

11 Every discovery request that comes in, opposing  
12 counsel can all accuse each other of gamesmanship and  
13 obstructing and what have you, but one good-faith  
14 endeavor is undertaken by the responding party to any  
15 discovery requests, which I'm going to look at the  
16 discovery request, I'm going to map it to the scope of  
17 the claims, possible defenses, and I'm going to make a  
18 judgment call about whether this is fair.

19 As I stand here today, that has been an  
20 undoable task at our law firm on behalf of Extreme.

21 I think what we know is the case today --  
22 although, I can't yet prove it -- is that whatever  
23 version of code my client bought from Broadcom/Brocade  
24 is not one of the eight asserted copyright  
25 registrations. I could be wrong about that. If I am,

1 as I'm standing before you, I'll be the first to admit  
2 it.

3 So we're going to have some litigation about  
4 that, whether this is enough of a modification or a  
5 derivation that it's covered by the registrations.

6 And we'll all have that fight. I'm sure it  
7 will be a long one and a fair one when the time comes.

8 What I am trying to do right now is with a  
9 high-technology client that makes switches, which, as  
10 you just heard, are not as cheap to buy as a microwave,  
11 and with massive, massive libraries of source code,  
12 including which is iterative, changing over time, thanks  
13 to these engineers, what is appropriate to be produced  
14 or not.

15 And opposing counsel may not be happy with how  
16 we have engaged them on this dispute, but it's a pretty  
17 darn fair one from our perspective. From outside  
18 counsel, if you want me to produce a document, you want  
19 me to produce source code from a product that you allege  
20 has your copyrighted code, can I see it? Because that's  
21 how I'm going to look for it. And we don't have that  
22 today.

23 THE COURT: Let me ask you this: They say that  
24 the copyright is embedded. Can you not do a search?  
25 They said there is commercial software available to

1 search for this.

2 I mean, I don't -- because there is nothing  
3 before me, in terms of sworn declarations and affidavits  
4 and such, I don't know what the problem is.

5 MR. NEUKOM: Well, that -- so that actually  
6 goes to my proposed definition of SNMP Research  
7 software. And you may hear -- I think you're going to  
8 hear three different proposals. We really did try.

9 My proposal from Extreme's perspective is as  
10 follows: We define SNMP Research software sequentially.  
11 And if I just put the Court to sleep, bear with me.  
12 Step one would be as follows: Extreme will produce  
13 source code for products which contain a source code  
14 that we purchased and received from Brocade. You just  
15 heard the transactional history about two hours ago. We  
16 will produce that.

17 At the same time, if the plaintiff will produce  
18 to us for the first time ever the complete body of the  
19 asserted registered copyrighted works, we can run a  
20 search, and if we have any products that have any of  
21 those registered copyright versions, we will produce  
22 that as well. I believe there are going to be none of  
23 those. That would be step one.

24 Step two, when I said this would be a  
25 sequential definition is: Once we actually have a copy

1 of the copyrights that have been being asserted against  
2 us, and once they have the source code for the products  
3 that we got from Broadcom/Brocade -- this is going to  
4 make everybody moan -- there will need to be a meet and  
5 confer, and we're going to have to negotiate on what the  
6 search terms or what the search protocols are for  
7 additional products.

8           And I'm not saying that to be cagey. I'm  
9 saying that for the exact opposite reason. The way the  
10 source code evolves over time -- right? -- all -- at  
11 least on the defendants' side, there are armies of  
12 engineers. And this source code is iterative. It  
13 changes. There are modifications. There are updates.  
14 There are complicated numbering schemes and  
15 up-versioning all the time.

16           Now, I could stand here and tell you that I  
17 will not produce anything unless it has the exact source  
18 code from one of the copyrighted registrations. I love  
19 that position. I actually think it's correct on the  
20 law. I also understand I'm going to get a lot of  
21 screaming from that because this stuff gets modified  
22 over time.

23           THE COURT: Now, even if it -- let me ask this:  
24 Even if it's modified, does that embedded copyright not  
25 stay with it?

1           MR. NEUKOM: It depends on how it's modified.

2 I actually have one factual disagreement with a comment  
3 that I heard from Mr. Ashley this morning, my friend at  
4 opposing counsel table.

5           I don't think it's accurate to say that various  
6 of these bodies of code when they're versioned up, that  
7 it's nothing but indicia.

8           My understanding for some of the subject matter  
9 of this case and just more generally for source code  
10 revisions is that is not right. There may, in fact, be  
11 deletions and things may be changed in order.

12          THE COURT: Including an embedded copyright?

13          MR. NEUKOM: Could be. That's right. Could be  
14 deleted. I mean, various portions of this could change  
15 over time.

16          THE COURT: Oh.

17          MR. NEUKOM: I -- God bless me, I am not a  
18 source code engineer at Extreme Networks, so I don't do  
19 this, but in litigating these cases, that's my  
20 understanding.

21          So if I were to take the position that I am  
22 such a generous man, I will agree to produce everything  
23 that has one of the eight copyright registered exact  
24 versions -- I'm going to get a lot of heat for that, but  
25 if they give us their registrations and I give them the

1 source code for the products that we bought, which is  
2 how we got dragged into this lawsuit, then here is  
3 what's going to happen: They're going to show up at the  
4 meet and confer, and they're going to say, "I want you  
5 to search for everything that has the words" -- I bet  
6 the Court has seen this when we're negotiating over  
7 search terms for e-mails; right? They will say, "I want  
8 any e-mail with the word 'and'." And I'll say, "I  
9 disagree. I'd like a boolean term with AT connectors  
10 with everything within 20 words." They're going to  
11 design the search term which will come up with  
12 everything. The defendant will propose a search term  
13 that comes up with nothing.

14 What I think needs to happen here is: After we  
15 actually get their copyrighted works, which Ms. Demers  
16 and I would really like to see, they get some of  
17 our -- the source code for the products that they accuse  
18 that we bought and thereby started copyright  
19 infringement. Let's exchange that. Counsel will look  
20 at it and retained experts will look at the source code  
21 as well.

22 Then we're going to have a negotiation about  
23 what the appropriate search term would be. So that they  
24 have accused of us of copyright infringement and they  
25 would like to see things which are modifications, slight

1 variations on code that they assert they own. Whether  
2 it's on unregistered work that was given to us by  
3 Brocade or whether it's one of the asserted works in  
4 this case, we'll have that discussion.

5                 The meeting and conferring in this case has  
6 been frustrating on all sides. You have just heard two  
7 hours of frustration from the plaintiffs' side. I can  
8 assure you it's been in good faith and with quite a bit  
9 of frustration on the defense side as well.

10               I don't impugn everything for that. That's the  
11 adversarial process. But if we can do that, once we're  
12 all looking at the same code, I think either we can  
13 agree to a reasonable search or not. And if we don't,  
14 we can bring it to this Court or -- my read on the room  
15 was my discovery master suggestion didn't go over very  
16 well. So I'm happy to drop that. But that would at  
17 least be a narrow dispute.

18               Now, I think what you're going to hear from my  
19 other friends on the other side of the podium is that's  
20 not right. Instead, we should just have to go look for  
21 SNMP code because we should be able to find it and  
22 identify it.

23               The problem for me is as follows: I started by  
24 talking -- and I don't think I've ever done this --  
25 about the fact that Ms. Demers and I have a special role

1 here as outside counsel. We're not source code  
2 engineers. We're not inhouse counsel of the company.  
3 In order for us to be signing our name to pleadings or  
4 to discovery answers and to be making representations  
5 about what we have or haven't found, and to be doing  
6 that in an imprecise definition of, it came from  
7 Dr. Case, it came from this wonderful company in  
8 Tennessee, that puts us in a pretty rotten position  
9 because I don't know how I can make that representation  
10 in any reliable way.

11 Instead, after each side exchanges, we're all  
12 looking at the same source code. We then negotiate.  
13 Not whether something is actionable because it hasn't  
14 been modified enough or -- or isn't actionable because  
15 it has. Let's treat it as -- let's treat it as source  
16 code, as it were, like it's an e-mail repository, and  
17 negotiate search terms. And then they will know exactly  
18 what they are and are not getting because it either hit  
19 on the search term or it didn't.

20 I will be able to make a representation that  
21 I'm not going to get accused of later on that we ran the  
22 terms through the appropriate repositories with the  
23 agreed-upon terms and that's what came up.

24 So I know that's not a silver bullet for a  
25 definition, but it seems workable to me. And just to

1 summarize, before I sit down, because I did promise the  
2 Court I'd be the fastest one today, number one, we will  
3 give them the source code for the products that we  
4 inherited, or purchased, rather, from Broadcom/Brocade,  
5 and if that same source code persisted over numerous  
6 versions of the product, they will get that as well.

7 They will not get, as an initial matter,  
8 modifications. And the reason I don't think they get  
9 modifications is for two things: Number one, it's a  
10 slippery slope for us. Number two, it puts me back in  
11 that untenable position of looking through source code  
12 and try to predict what SNMP would or wouldn't call its  
13 own. Number two -- or 1-B, if you will, because I think  
14 it should happen at the same time, they finally show us  
15 the copyrighted works that they have sued us on. Number  
16 three, we then have maybe a disagreeable, but at least a  
17 transparent, or apparent, as the case may be, discussion  
18 about what the further searching steps would be for what  
19 would or wouldn't come in.

20 To be clear, I bet that process is going to  
21 have me producing more source code for more products  
22 than we will later at summary judgment or a trial be  
23 anywhere close to admitting are covered by the claims  
24 against us, but that's -- if done with proportionality  
25 and with an eye towards burden, that's fine. That's

1 part of the discovery process. But it at least gets us  
2 transparency.

3 I have about 52 other comments that I'm itching  
4 to make to the Court, but I'm going to pass the podium  
5 over to Ms. Plessman, who represents Broadcom/Brocade,  
6 and I'm happy to address any questions from the Court  
7 about what I hope is a practical solution.

8 THE COURT: Okay. Thank you.

9 MR. NEUKOM: Thank you.

10 MS. PLESSMAN: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MS. PLESSMAN: As he said, my name is Allison  
13 Plessman, and I represent defendants Broadcom, Inc. and  
14 Brocade in this case.

15 I think there is a lot to unpack here, and I'm  
16 not going to be able to refute every point. And this  
17 isn't an argument on the merits; although, suffice it to  
18 say, there are some things I agree with from  
19 defendant -- or from plaintiffs and there are some  
20 things that we disagree with, and I'm not going to be  
21 able do that unless I spend the next five hours. So I'm  
22 not going to do that.

23 But I do think it's important to put a few  
24 things, a few background points into context so you know  
25 where we are coming from.

1               First of all, as defendants have explained to  
2 plaintiffs many times, Defendant Broadcom, Inc. is a  
3 parent holding company. It's not an operating company.  
4 It doesn't have employees and it doesn't have products.  
5 So a lot of our responses to the requests are based on  
6 that because that's just a fact. And they seem  
7 unwilling to accept that, but unfortunately that's just  
8 the case. Its subsidiaries and affiliates, though,  
9 include approximately 150 separate entities around the  
10 world; one of which is Brocade.

11               And the SEC filings and publicly-available  
12 documents, which plaintiffs have equally available to  
13 them, show that Broadcom, Inc. did not acquire Brocade  
14 until after Brocade's divestiture in October 2017.  
15 Broadcom acquired Brocade in November. So that's also a  
16 source of contention, but it's publicly available. They  
17 know that to be the case, and yet they still ask for  
18 things like all documents relating to the merger, the  
19 acquisition of Broadcom of Brocade.

20               That can't be relevant. And the problem with  
21 talking about this at a high level, you know, these  
22 categories, yes, could some documents relating to  
23 Broadcom's acquisition of Brocade be relevant? Yes.  
24 Could some documents relating to the divestiture of  
25 Extreme be relevant to the extent it pertains to SNMP?

1 Of course.

2           But their request asked for all documents  
3 relating to these very broad topics, and that's when you  
4 really start to break it down. And then on top of it in  
5 each of these requests -- now, I can see if you're not  
6 Broadcom and Brocade where we're fixed on this  
7 definitional issue. You start to get -- as you look  
8 through the response, you just see Brocade and Broadcom  
9 and it looks like it's targeted to those defendants.  
10 Behind -- and the same with SNMP Research. You  
11 assume -- Research software. You assume it must just be  
12 the software in the Complaint.

13           But when you keep going back to the defined  
14 entities and the defined software, you realize that  
15 every single request is sucking in 150 entities as if  
16 they're parties to the litigation. And that is the  
17 problem. So not only are they overbroad seeking all  
18 documents relating to these broad categories, but  
19 they're applying those requests to 150 entities.

20           So I think that those threshold issues, if we  
21 can get to those definitional issues and just focus on  
22 the software that's at issue in the Complaint, the  
23 entities that are actual defendants, we will move so  
24 much faster.

25           THE COURT: And I think an appropriate response

1       in that sort of situation would -- instead of just an  
2       objection that it's overbroad would be state what you  
3       have. These are the ones relevant to SNMP. We have  
4       other documents, but they are outside the scope of those  
5       dealing with this particular issue because we have 150.  
6       Go about it in the reverse.

7                  MS. PLESSMAN: So let's -- let's talk about the  
8       withholding issue because it kind of touches on that.

9                  THE COURT: Because the rule does require that.  
10       If they're withheld, you have to state that there are  
11       documents being withheld. So I would like to --

12                  MS. PLESSMAN: Yeah, and I understand that.  
13       And this is the way that -- and, actually, if you look  
14       at plaintiffs' reply brief, they actually point to  
15       language in the advisory committee that we believe  
16       applies and makes sense.

17                  And I think if you -- if we use an example from  
18       how plaintiffs themselves did it -- I know we haven't  
19       filed a motion to compel first, but I think just for  
20       illustration purposes, it shows that our response  
21       actually is more helpful.

22                  So the way that we interpret that, there is an  
23       advisory committee note that says that if you provide  
24       the limits of the boundaries of what you're producing,  
25       then that qualifies as to what you're withholding.

1           So what we do is: We say, "Here is our  
2 objections, but we will produce non-privileged  
3 documents." So we're not producing the ones that are  
4 subject to the privilege objections, you know, from this  
5 date to this date. So that brings in the time frame.  
6 For Brocade, Inc. We're construing it to apply only to  
7 Brocade, Inc.

8           So, in our response, we are providing the  
9 limits. That's how we construe that rule. Now, I defer  
10 to Your Honor exactly how to do it, but we weren't doing  
11 it in bad faith.

12          So let me -- let me just compare what  
13 plaintiffs have done. First of all, they don't say  
14 they're withholding documents on an  
15 objection-by-objection basis. What they do is: They  
16 list -- they have a laundry list of objections, and at  
17 the end, they say, "But we're withholding documents."  
18 And then they say, "But we're also producing them."

19          And so in meet and confers, I said, "Well, what  
20 objections are you withholding? What are you  
21 producing?" And they say, "Well, we don't actually know  
22 what we're withholding. We haven't done the search yet.  
23 We don't know the categories of documents. Like you  
24 said, we" -- you know, "This is a huge case. We're  
25 doing all this review. We don't know exactly what could

1 possibly be withheld."

2 So it's meaningless that way. Whereas, the way  
3 that we're doing, we're trying to provide the boundaries  
4 of exactly what we're willing to produce so that we can  
5 have a meaningful meet and confer.

6 So that's why we thought that the way that we  
7 were doing it was actually the spirit of the rule. That  
8 was the purpose, to help somebody understand, "Okay.  
9 You have these objections, but what are you agreeing to  
10 produce?"

11 So that's the way that we approached it. And,  
12 again, you know, if you have a --

13 THE COURT: I'm still at a loss as to why there  
14 have been, I guess since last summer, four meet and  
15 confers and we're still here and nothing has been -- I  
16 don't -- I don't understand.

17 MS. PLESSMAN: Yeah, let me talk about that.

18 So, I think it is important to go through kind  
19 of the chronology. And I'm not going to belabor every  
20 point. And I agree. I don't -- I don't want to impugn  
21 anybody. You know, but I do think it's -- you've got to  
22 do a little finger pointing.

23 THE COURT: I don't -- I don't want to impugn.  
24 I want to understand so we can get to the core problem  
25 and get you all moving.

1 MS. PLESSMAN: So let me explain a little bit.  
2 So, Your Honor issued the ruling in June 2019, basically  
3 saying, meet and confer on these requests, you know, and  
4 there had been a period of time where we were in a  
5 standstill. So we did. We immediately tried to meet  
6 and confer. But we were focused on the issue of that  
7 Interrogatory No. 1. And we barely met and conferred  
8 about any of the others, and there are several requests  
9 that we didn't even meet and confer about.

10 But once we reach an agreement that we were  
11 going to limit our response to the items in paragraph  
12 64, they wanted us to respond to that as soon as  
13 possible to get the ball rolling.

14 So we said, "Okay. We're going to try to do  
15 that in a month." It was a lot of information to  
16 compile. So we got to the end of the month and they  
17 said -- and, again, we didn't confer about a lot of  
18 responses that you said that we should. The plan, in my  
19 mind, was that we would, but we were trying to get that  
20 initial response that all of the other requests are tied  
21 to.

22 So we say -- you know, we get to the end of the  
23 month and we say, "We need a little bit more time."  
24 Instead of waiting or asking or talking and -- they just  
25 filed a motion which they later withdrew. So that whole

1 month we are then responding to the motion and trying to  
2 supplement our response.

3 And so we supplemented our responses, as the  
4 parties agreed, and later they didn't like that  
5 agreement, and, fine, I'll get to that. But we were  
6 spending both our time responding to the motion, trying  
7 to supplement, and then we said in a number of responses  
8 that you have before you, you know, we'll agree to meet  
9 and confer, referring back to Your Honor's order because  
10 we had not yet met and conferred about them.

11 So, I understand from your perspective, it  
12 might look like -- you know, if we were just looking at  
13 it for the first time and there wasn't that history,  
14 we're just saying we'll meet and confer. But the reason  
15 for that is because we hadn't yet done it in response to  
16 your order. There were several topics that just didn't  
17 come up at all.

18 So we get to the supplemental response. We  
19 thought we did it exactly as agreed. They don't like,  
20 for example, that we agreed to limit it to the  
21 paragraphs in 64. But Broadcom didn't respond to those  
22 paragraphs -- or for those products.

23 Well, the reason Broadcom didn't respond for  
24 those products is because it doesn't sell products. It  
25 doesn't sell the products in 64.

1           THE COURT: Was that discussed at the meet and  
2 confer?

3           MS. PLESSMAN: Oh, yes, yes, yes. Yes, they  
4 know that. We've gone over that many, many times.

5           And that's true for a lot of the Broadcom  
6 responses. We repeat over and over again, well, they're  
7 not selling products in Tennessee. They're not selling  
8 products here. They're not -- they're not involved in  
9 the marketing and advertising of products. They don't  
10 have employees. So I don't really know how much more we  
11 can provide on that topic.

12          And the problem with the meet and confer since  
13 then, and even before then, the way that they went, it  
14 was very much in the vein of, "We don't have to  
15 compromise at all because we think just on these broad  
16 topics, they're relevant; so we're not going to  
17 compromise at all." And I was approaching it, and I  
18 think Extreme was approaching it as, this is the  
19 starting point. There is some requests that were just  
20 facially overbroad. Look at these definitions applying  
21 to 150 companies.

22          We can get to a point where we agree, but when  
23 you're trying to negotiate with somebody that is just  
24 saying, "This is it. This is the way it's going to be,"  
25 it's very difficult.

1           So we did reach some agreement, and as I said,  
2 we agreed to produce documents responsive to dozens of  
3 requests. And to this point, we have -- I think we have  
4 collected from 34 custodians that we think are most  
5 relevant or likely to be relevant to this case. It's  
6 over 5 million documents already just with those. But  
7 it has nothing to do with the 150 companies that have  
8 nothing to do with this litigation.

9           It takes time. Most of those documents are  
10 going to be irrelevant. This is actually a pretty  
11 straightforward case. But in order to do, like, a  
12 reasonably diligent search, we cast a wide net. We're  
13 not trying to delay or hide documents, or, you know, get  
14 around our discovery obligations. We know we're going  
15 to have to produce documents relating to the contract  
16 with Brocade and communications about it and that sort  
17 of thing.

18           But what we don't want to do is take this -- it  
19 can't be a fishing expedition. And just as an example,  
20 when we were talking about how to limit the SNMP  
21 Research software definitions, I think that is the  
22 easiest issue from my perspective.

23           From my perspective, it should just be the  
24 software that's listed in Table 1 and the software that  
25 Brocade received under the license agreement. And what

1 I added, and when we were conferring over the lunch  
2 break, was that if they're concerned that we may have  
3 made modifications, we can add that into the definition,  
4 any modifications that Brocade might have made.

5 And I explained that the problem with expanding  
6 it beyond that is, for one, if it wasn't registered,  
7 then it's not going to be the subject of a copyright  
8 infringement claim anyway. So what else is there? And  
9 if it wasn't provided to Brocade under the license  
10 agreement, then it's not relevant to the breach of  
11 contract claim.

12 So it seems like why -- why can't we just agree  
13 that that's the relevant software? And then they're  
14 saying, well -- and then the additional point is: We  
15 don't know whether your predecessor or subsidiaries or  
16 employees created some software, what the name of it is,  
17 whether there is a subsidiary in Venezuela who, you  
18 know, might have had some agreement, and how would we  
19 even find that? And why is that relevant at all because  
20 it might have been a perfectly legal agreement that has  
21 nothing to do with the case? Or, at the very least, if  
22 you think there is software, like, that aren't -- that  
23 isn't in that -- you know, the copyright  
24 registered -- the registration listed in the Complaint  
25 or the software provided under the license agreement,

1 list it for us. Tell us the names of the software.  
2 It's their software. Tell us what you want us to look  
3 for.

4 But, instead, you know, they want to just have  
5 this undefined third category of software that they have  
6 created that they won't tell us what it is, what it's  
7 named. You know, it's like a catchall that's  
8 unnecessary because it necessarily wouldn't have  
9 anything to do with the allegations in the Complaint.  
10 We're focused on the copyrighted works and the license  
11 agreement software.

12 So I really just don't understand why that's an  
13 issue. We've talked about it. I've tried to explain  
14 that issue over and over and over again in the meet and  
15 confers and it just has gone nowhere.

16 And what's most troubling is what I heard over  
17 the lunch break because we said, "We don't have any  
18 reason to believe" -- "There are a couple entities that  
19 have license agreements with SNMP that, you know, are  
20 not at issue," and they said, "They will be excluded."  
21 And we said, "We don't have any reason to believe that  
22 anybody, any of the other 150 entities have it."

23 But for us, when you're responding to  
24 discovery, when you actually make them part of the  
25 definition, it makes them, in effect, parties to the

1 litigation. "In order for us to verify, what do you  
2 want us to do?" And Mr. Ashley suggested that we would  
3 have to search the source code of all products of all  
4 150 entities to prove a negative. And that is exactly  
5 the problem; right? If we could just represent -- you  
6 know, we can informally represent and say, "Hey, we're  
7 not aware of anything. Do you have any reason to  
8 believe this?"

9                 But when you're putting it in a discovery  
10 response, what are you having to do? Are you having to  
11 review all these products, the source code of  
12 everything? Are you collecting documents from 150  
13 entities and then applying, you know, how many search  
14 terms against millions and millions of documents?

15                 It just doesn't make sense because the claims  
16 in this case are not related to Brocade disclosing the  
17 software to their affiliates. And if they really wanted  
18 to just know that, even though I would say it's  
19 irrelevant, but at this point, we would be willing to  
20 answer it, they could have served a discovery request  
21 saying, "To which affiliates did Brocade," you know,  
22 "disclose the software that it received under the  
23 license agreement?" And we would say none because it's  
24 focused on Brocade. It's not just asking about all 150  
25 entities and what they're doing and putting them on the

1 spot and making Brocade answer on behalf of those 150  
2 entities.

3 And they're doing that throughout. You know,  
4 even to the extent for the -- there are requests, for  
5 example, asking for all financial documents for a  
6 certain period of time from all 150 entities.

7 That's -- I have never seen anything like that.

8 And so when you -- when you read their  
9 requests, you really have to make sure that you -- when  
10 you see Broadcom and Brocade and you see SNMP Research  
11 software, that you refer back to the defined terms, and  
12 then it becomes very, very clear how facially overbroad  
13 it is. It's difficult to even -- there has been a lot  
14 of talk about burden and showing, you know,  
15 what -- showing undue burden. But the 150 entities is  
16 the initial threshold burden because in order to even  
17 get to those more exact burden calculations, you would  
18 have to -- you would have to do this crazy search of 150  
19 entities.

20 So what I think makes sense, you just -- the  
21 entities should be the defendants, Broadcom, Inc.,  
22 Brocade, and then if you want to add in predecessors  
23 because there is this issue with Broadcom, Limited,  
24 fine. But there is no reason to add all the entities.

25 And then they think you can have reasonable

1 discussions about burden and whether or not it makes  
2 sense and how to limit the requests because then you're  
3 actually talking on a reasonable scale. It's easy to --  
4 it's easier to assess the burden in the first place;  
5 right? We can go to our 34 custodians, which I think is  
6 a lot of custodians for a case like this. We were being  
7 very generous in applying, you know, what is and what is  
8 not potentially relevant.

9           Then you can say, "Okay. Well, if you're  
10 asking for" -- whatever -- "all documents relating to  
11 the merger, we can start running search terms to see how  
12 many numbers come up against those documents."

13           But to do that against 150 entities as a  
14 starting point, that's just -- we've got to get past  
15 that as the threshold point, so that then we can have  
16 the meaningful meet and confers.

17           And this is an issue that we've talked about so  
18 much in the meet and confers, and then we've spent very  
19 little time at all on the actual substance of the  
20 request.

21           And, frankly, we were surprised when they filed  
22 the latest motion to discover because there is still a  
23 lot of issues to work out, and I feel like the parties  
24 could meaningfully compromise if there was any desire to  
25 compromise, or any belief that they need to, and they're

1 coming at it from a place where they don't need to move  
2 at all because they're the plaintiffs and there is this  
3 very broad concept of relevance, which I don't dispute,  
4 but it is not without bounds. And what we're dealing  
5 with right now is a fishing expedition.

6 So when we have these meet and confers, I will  
7 tell you that what we've heard today is the most  
8 detailed explanation I've ever heard through any of  
9 these hours on the meet-and-confer calls.

10 When I've asked, "Well, what's the reason why  
11 you need this," or X, Y, I've gotten, "There are  
12 reasons. We might have other claims. They" -- you  
13 know, "One of these entities may have received it  
14 for" -- "software from someone." Those aren't -- those  
15 aren't reasons. And it's very difficult to meet and  
16 confer when you're hearing those sorts of --

17 THE COURT: You did not have an in-person  
18 meeting. This is not the first time, first case I've  
19 heard these sorts of matters. It's very helpful when  
20 you get in the same room and you do hear each other.

21 MS. PLESSMAN: Yeah. You know what? And I'm  
22 fine with that, and I do feel like this is -- I do feel  
23 like if we can get through this defined term issue, and  
24 I just feel very strongly that this is not complicated.  
25 It should just be the parties to the case and it should

1       be software that's at issue in the Complaint. I don't  
2       even know why that's a dispute. I really don't. The  
3       only reason that they possibly want to expand it is  
4       because they might have other claims, and that's just  
5       not good enough.

6                  What I think makes more sense is: First you  
7       limit it to the parties in the case and the software in  
8       the case, and then as we produce these documents, if  
9       there is something in the discovery they receive that  
10      triggers something, they're, like, "Ooh, this is a  
11      problem," or, "Oh, now we need more about this," well,  
12      then you have that discussion. Then you issue more  
13      discovery responses. Then you expand it; you have that  
14      talk. But you don't start with 150 entities.

15                 I've just never seen anything like that. So  
16       that's -- I mean, I think that there is a lot to go  
17       through. And I can explain a lot more, but I do believe  
18       that -- and I don't want to leave anything -- what I  
19       don't want is to leave and then not have addressed a  
20       specific request and then have to, you know, have some  
21       really burdensome or a bunch of -- produce a bunch of  
22       irrelevant documents because I didn't address it today,  
23       but my firm belief is that if we can come -- if we can  
24       start with the parties to the case and the software at  
25       issue in the Complaint, we can produce documents much

1 more quickly. We can get to that next stage if there is  
2 additional documents, if we need to expand it. And if  
3 there is really, like, an entity that they are really  
4 concerned about, we would consider adding that, but not  
5 150. And then I think -- and then we're moving. And  
6 then we can come back on -- you know, on targeted  
7 requests, saying this one is a problem even with the --  
8 you know, even with the terms narrowed, or, you know, we  
9 haven't been able to reach consensus on this; that kind  
10 of thing.

11           And I don't -- I don't have a problem with that  
12 sort of phased approach, necessarily. What I do have a  
13 problem with, though, is that when the parties reach an  
14 agreement, and even if it's preliminary, and we follow  
15 that agreement and then being told, "Well, they're  
16 playing" -- "It's shell games. They're being  
17 disingenuous," because we just did what we agreed to.  
18 We -- nobody ever said that's the only, that's all we'll  
19 ever produce.

20           Like, for Interrogatory 1, we never said that  
21 we wouldn't provide additional information or that we  
22 would only limit it to paragraph 64. What we said is,  
23 like, "Well, why don't we just limit it to Brocade, just  
24 the one entity and just the software at issue and then  
25 just frame the interrogatory that way?"

1           And, again, I may be -- maybe I'm seeing it the  
2 wrong way, but, to me, that just seems very reasonable,  
3 at least as a starting point, and then, you know, if  
4 other things come out of discovery -- and they have got  
5 a lot of requests, so if there is another problem,  
6 they're going to see it. They're very good lawyers.  
7 They are going to identify it. They can give a targeted  
8 request. But I just -- I think you've got to have a  
9 starting point that's more reasonable. Otherwise, it's  
10 just too much. We're already at 5 million documents.

11           THE COURT: Okay.

12           MS. PLESSMAN: Do you have any questions that  
13 you want me to address on the other topics? I know  
14 there were several.

15           THE COURT: No, I want to try to get to some  
16 productive conversations on where we go from today  
17 before you all need to leave.

18           So it seems like it would be a very reasonable  
19 starting point to start the production with the parties  
20 and with the products listed in the Complaint. That  
21 sounds very reasonable. And then it seems that could be  
22 done -- it should be done quickly. This has been  
23 pending for quite a while.

24           Then you could look -- and I'm just talking out  
25 loud at the moment. I'll hear your comments about it

1 and what issues may arise. But that does sound very  
2 reasonable.

3 And then as you do look through things, it's  
4 not saying that that's the end of it. I understand that  
5 there may be -- there may be more claims. You're  
6 entitled to the discovery to pursue that. But, at this  
7 point -- and I would like to hear your comments on the  
8 150 entities. I'm not sure at this point, based on what  
9 I know today, where that will go, but it does make -- it  
10 does make sense that, go ahead and start with what we  
11 have with Broadcom and then see what you get.

12 Mr. Wood.

13 MR. WOOD: Your Honor, can we have three  
14 minutes to caucus among ourselves before we move on?

15 THE COURT: Yes.

16 MR. NEUKOM: While we do that, may I make one  
17 request for clarification before my friends caucus?

18 THE COURT: If you all would pause for just a  
19 minute and see if his request may impact your  
20 discussions.

21 MR. WOOD: Okay.

22 MR. NEUKOM: This is somebody's paper.

23 I wrote down what you said. It makes sense to  
24 me. I just wanted to make one beating-of-a-dead-horse  
25 request that we add to that the production from the

1 plaintiff of the source code for the copyright  
2 registration.

3 THE COURT: And I do want you all to talk about  
4 that because I've heard your request, which is -- it  
5 seems to me you're intertwining the definition of what  
6 we're looking at along with this copyright, and --

7 MR. NEUKOM: Well, okay. I think I am. Sorry,  
8 I didn't mean to talk over the Court.

9 THE COURT: No, go ahead.

10 MR. NEUKOM: I only represent Extreme. Against  
11 Extreme, there is no breach of contract or license  
12 claim.

13 I think the issue gets -- I think Ms. Plessman  
14 could advocate on the implications of that better than I  
15 ever could.

16 But from Extreme's perspective, given that the  
17 only claim is copyright infringement, Your Honor heard  
18 how boring Ms. Demers and my law practice is. We really  
19 need to see that code to understand the scope of the  
20 case.

21 So I don't intend to be asking for anything  
22 controversial. With the products listed in the  
23 Complaint for the parties who are named to the suit, I  
24 just wanted to respectfully ask if we could add to that,  
25 also. Could we please get those --

1                   THE COURT: The code.

2                   MR. NEUKOM: Not the code source deposits that  
3 went to the Copyright Office, which is just like the  
4 first 25 and last 25 pages; the whole shebang, the  
5 copyrighted work.

6                   So, to use my analogy before, if we're accused  
7 of ripping off a book, we would sure love a copy of that  
8 book.

9                   THE COURT: Well, in your discussions, please  
10 take that request into account. And then we'll take a  
11 five-minute recess and come back and see where we are.

12                  MR. NEUKOM: Thank you.

13                  THE COURTROOM DEPUTY: All rise. This  
14 honorable court stands in recess.

15                  (A brief recess was taken.)

16                  THE COURTROOM DEPUTY: All rise. This court is  
17 again in session. Please come to order and be seated.

18                  THE COURT: All right. Mr. Wood.

19                  MR. WOOD: So I wanted to address with Your  
20 Honor about starting the production and then very  
21 quickly want to go to the definition of SNMP Research  
22 software, see if we can get some resolution on that --

23                  THE COURT: Okay.

24                  MR. WOOD: -- hopefully. So we are -- we  
25 completely agree with Your Honor. We think that's a

1 great place to start, with the production, the products  
2 that are listed. That's what we've been trying to get  
3 for a while. That was our initial proposal -- call it a  
4 compromise -- that we made with the parties to kind of  
5 get things rolling.

6 We just want to be clear that that is all  
7 versions of the products. Not just the ones that  
8 existed in 2017 or 2019, but all the versions we've  
9 asked for. And we've asked for a limited period of  
10 time, so --

11 THE COURT: So the products listed in the  
12 Complaint and all versions of those specific products?

13 MR. WOOD: Correct.

14 THE COURT: So it will be the source code for  
15 those specific things?

16 MR. WOOD: Yes.

17 THE COURT: Okay.

18 MR. WOOD: And I just want to -- I think it's  
19 helpful. This is just on that point because my  
20 understanding of Mr. Neukom's proposal is that they only  
21 provide what was existing in 2017, or -- actually, I  
22 think what he said was, "We're only going to give you  
23 what we got from Brocade." Not, "We're going to give  
24 you what's in our products," which, as we've explained,  
25 is what we really need to see.

1           And I had -- so, Document No. 98, which is an  
2 e-mail that -- and it's Exhibit C to the Weber  
3 declaration. So it's an e-mail from Extreme, actually,  
4 to me with -- describing what they have. There is an  
5 attachment to that e-mail, and we didn't put it in the  
6 record just because we felt like it was a lot of detail  
7 and maybe Extreme's confidential information. But I  
8 think it's informative for what we're doing here.

9           If I can, I'd like to pass one up to Your  
10 Honor.

11           THE COURT: Uh-huh. Yes, you may.

12           MR. WOOD: So this is the --

13           THE COURT: I'm sorry, Mr. Wood. The phone  
14 line disconnected. I guess I'm not -- we're going to  
15 see if we can get him back on.

16           (A brief recess was taken.)

17           THE COURT: Okay. Sorry, Mr. Wood. Go ahead.

18           MR. WOOD: So this is the attachment that  
19 Extreme sent us showing all their SKUs that contained  
20 SNMP Research and how many shipped by year. So they  
21 determined in 2020, that they had shipments of products  
22 with SNMP up through 2020, and it's our belief that that  
23 has continued.

24           The other point I would point out, in terms of  
25 the second page, if you look at the products at the end,

1 you notice that some of those didn't even start  
2 distributing until 2020, which means they were putting  
3 it in new SKUs. So the 9150 has some in 2019, and then  
4 some of the SKUs didn't even ship until 2020.

5 So they have our software. They know they have  
6 it. To only give us what was existing in 2017 really  
7 doesn't -- is not really even a start because they  
8 are -- they already know and they have given us a chart  
9 that shows that.

10 And these are the products that are listed in  
11 the Complaint, the ones on this -- the ones here  
12 (indicating). So they were able to do it with a lot of  
13 detail.

14 And I'd like to show -- while I only have one  
15 of these, I think I can show it on the ELMO and then  
16 maybe everyone can see it because it actually has source  
17 code.

18 So this is another -- this is an e-mail from  
19 Extreme, and our request was what -- they had an issue  
20 with some source code, and that's the reason this  
21 has -- because it actually has SNMP Research source code  
22 in it. So we're trying to keep that confidential.

23 But if you notice, Ms. Sipes from Extreme  
24 Networks, she says this is the version and this is the  
25 copyright screen out of their source code.

1           So your question to Mr. Neukom was, "Why can't  
2 you just look at the copyright string?" Well, that's  
3 exactly what they did back in 2018 when this -- when  
4 this first started. They looked and said, "Hey, this is  
5 what we're using. It's right here in the source code."

6           And it's not clear why Mr. Neukom wouldn't know  
7 about this. This has been -- I mean, it's their e-mail  
8 and/or any other counsel, or why he couldn't have  
9 inquired of their engineers to figure it out.

10          The other thing I wanted to comment on goes to  
11 this exact same point. His analogy that it's like suing  
12 someone for a book and you don't have a book. They have  
13 the book. This is proof that they have the book.

14          What they don't have is the copy of the book  
15 that we filed with the Copyright Office. That's all  
16 they're asking for. They have the book. They know  
17 exactly what the book says. They can read the book, and  
18 they can tell which products have the book in it, you  
19 know, have our software in it.

20          So, I mean, to us, it's just not -- it's just  
21 not credible that they don't know what's going on  
22 because we've got all this information in front of us.

23          THE COURT: Okay. At the beginning of your  
24 argument, Mr. Ashley said there had been an offer for  
25 the simultaneous exchange, and it would be you would

1 give them the source code. What exactly does that mean?

2 MR. WOOD: So that's the copy of the source  
3 code that was actually registered with the Copyright  
4 Office. So that's what they have.

5 So in order to do an infringement  
6 analysis -- so to know you have the software should not  
7 be an issue because you have the book. You can see  
8 what's in the book.

9 To do an infringement analysis, you need to see  
10 exactly what was registered with the Copyright Office,  
11 and you'd get an expert and they will compare what was  
12 registered at the Copyright Office to what's in the  
13 product. That's what we need to do to prove our case.  
14 That's what they're going to do to try and defend the  
15 case. And we both want to do that at the same time.

16 So we're fine, also, you know, if they will  
17 produce -- they're going to produce all the source code  
18 for all their products --

19 THE COURT: Okay.

20 MR. WOOD: We're fine with it at the same time  
21 so our experts can start at the same time and we have  
22 all the same information.

23 What we don't want is --

24 THE COURT: Okay.

25 MR. WOOD: -- we don't get anything, they do an

1 infringement analysis, and inevitably they come back and  
2 say it doesn't exactly match, or there is some defense  
3 and we're right back in front of you. So that's where  
4 we think your proposal --

5 THE COURT: Okay.

6 MR. WOOD: -- we're completely in --

7 THE COURT: So you do not have any issue with  
8 the copyright Mr. Neukom has requested for the  
9 simultaneous exchange?

10 MR. WOOD: We don't have any issue with that.

11 THE COURT: All right.

12 MR. WOOD: So that, I think -- hopefully that  
13 resolves that issue.

14 THE COURT: Well, let me ask this question.

15 MR. WOOD: Okay.

16 THE COURT: So I think that would be the most  
17 reasonable thing is to schedule the simultaneous  
18 exchange. So we need to have a very specific date by  
19 which to do that.

20 So I do not know how long that it would take  
21 for you to get your copyright information. It seems  
22 like it wouldn't take very long to get the source code  
23 from at least the versions in the Complaint. It does  
24 make sense that it would go for future versions because  
25 something has been shown that it still includes the

1 source code. So all that makes sense.

2 So I need a time estimate to put in the order.

3 Not an estimate, I need a date. So I need to know what  
4 you estimate so I can decide on a date.

5 So let me start by -- so, okay.

6 MS. PLESSMAN: I'm so sorry. I think that  
7 because Extreme -- what Extreme -- and Broadcom and  
8 Brocade might be a little bit different. Do you mind if  
9 I just --

10 THE COURT: No, come up. I want to take all  
11 that into account because I want one date.

12 MS. PLESSMAN: Are you finished or --

13 MR. WOOD: I'm done with that. I still want to  
14 address the SNMP Research software, but I can do that  
15 after we address this issue.

16 THE COURT: Okay. I'm sorry.

17 MS. PLESSMAN: Okay. So, just to give you a  
18 little bit of background on the source code and some of  
19 the source of confusion about the requests and what  
20 exactly has to be provided and when, we agree with  
21 Mr. Neukom that the initial phase -- and we proposed  
22 this last summer, and as Mr. Ashley said, this could  
23 have been done very quickly if they had just agreed, and  
24 there is really no dispute that that software that was  
25 registered with the Copyright Office has to be provided.

1 So there is no dispute about that, and we think that's  
2 the first step.

3 But with respect to the requests for source  
4 code and other requests that are sort of related, there  
5 is a lot of confusion in the way that they frame the  
6 request. And we've talked about this in meet and  
7 confers, but it continues to be a problem.

8 They talk about needing the source code for all  
9 versions of all releases of the products, of all  
10 products that are listed in this paragraph.

11 But the way that the SNMP -- so just stepping  
12 back, and as Mr. Ashley said, there is the SNMP  
13 protocol, which it's been around for decades and, as you  
14 said, it basically helps devices on a network to  
15 communicate with each other. That is not SNMP Research.  
16 Plaintiffs, they don't own that. That's a protocol.  
17 There are several, many, many different implementations.  
18 Their implementation is one of them.

19 And, in fact, the -- Brocade has now replaced  
20 the SNMP implementation with a free open source  
21 implementation available on the internet.

22 So that's what we're talking about. We're  
23 talking about an implementation of an SNMP protocol for  
24 which there are many and now they're freely available on  
25 the internet. Just to -- and I think that's important

1 for the proportionality point because what we're talking  
2 about here is the code on -- we're really not talking  
3 about the products. We're talking about the software  
4 that's in the products, and the software is part of an  
5 operating system.

6           The SNMP portion, when it was on Brocade's  
7 operating system -- and there is no dispute about that  
8 because we got it under the license agreement -- it was  
9 a tiny fraction of Brocade's overall operating system.

10           So when they asked for new versions of  
11 different releases of the products, I think what they're  
12 really saying, which we've tried to understand, is that  
13 they're talking about versions of the operating system  
14 and how it's changed over time and the SNMP portions of  
15 that.

16           And so what we have said is that it might make  
17 sense -- again, I think there is that initial phase to  
18 make sure that the copyrights were actually registered  
19 because that's a prerequisite to filing a copyright  
20 infringement claim. So the case should never have been  
21 brought if the codes don't match.

22           And one of the issues, as you mentioned, was at  
23 a meet and confer, they did admit that the version that  
24 was provided to us wasn't registered. So there is  
25 serious concerns about that.

1           You can't say in a Complaint that it was  
2 registered and then have that not be true, and then go  
3 through and have the situation where Brocade is giving  
4 its entire operating code when the SNMP portion is a  
5 tiny fraction -- and those are the crown jewels of  
6 Brocade's entire business, the non-SNMP portion -- when  
7 we might have a situation where the copyright  
8 infringement claim should never have been brought.

9           And that's why we're so concerned about that  
10 initial phase, which, again, Mr. Ashley said could  
11 happen very quickly.

12           But then with respect to the actual exchange of  
13 source code, what -- what we don't want to have is in  
14 that initial exchange where they provide that copyright  
15 exchange, we're providing our entire operating system.

16           What we want to do is provide the -- you know,  
17 the software that we actually received under  
18 the -- under the agreement to see if they're the same;  
19 to just do an initial comparison to make sure that this  
20 is a claim that should have been brought.

21           It's not -- they said it's an entire  
22 infringement analysis, but they also said that that  
23 could happen very quickly and that there should be no  
24 doubt, and, you know, we'll understand very quickly that  
25 that was, in fact, registered.

1           But that's what we've been proposing, just to  
2 have that check that we aren't -- based on their own  
3 representations in the meet and confers and the fact  
4 that our version is not listed in the Table 1 of the  
5 Complaint, I think that's an entirely reasonable  
6 proposal just to make sure that what we're talking about  
7 is onboard; right? That we're not just opening up the  
8 entire operating system, which is massive, and has  
9 nothing to do with SNMP.

10          And the other issue for us is: We're not  
11 talking about -- there is a lot of talking about copying  
12 and that they need to be able to compare lines of code.  
13 That's not the case for us. This isn't a case where,  
14 say, an employee was working for a company and they took  
15 the source code and then they put it in their new  
16 company's software. Now you have to try to find it  
17 somewhere in their software and try to determine whether  
18 or not it was copied and stolen. They know; we all know  
19 that we had the software. We know where it is.

20          They even said, and we've -- we acknowledged  
21 it, too, there is -- there are files that are specific  
22 to SNMP. We don't use it anymore, but in the -- when we  
23 did, there are SNMP files that can be isolated. There  
24 is no reason to provide the entire code, especially at  
25 this first stage when we're still -- we still need to

1 verify that this is a claim that should even be here.

2 So that's our position on that. Do you have  
3 any questions?

4 THE COURT: Not at the moment.

5 MR. NEUKOM: Once again, I'll try to be brief.  
6 I heard the Court's suggestion. Look, as an initial  
7 point, I hope part of what's been going on for the last  
8 year might be coming clear to the Court that it's not  
9 necessarily -- it's that negotiating these issues,  
10 especially with repositories, is tricky stuff. And I'm  
11 sure it's not the first time this Court has adjudicated  
12 a source code fight.

13 For the suggestion that we produce all source  
14 code for all products across all time, so long as they  
15 track one of the 11 named product families in the  
16 Complaint, I intended to say yes to show the Court how  
17 reasonable I am, but there is a practical issue there.

18 Look, as an initial matter, the projector  
19 showing -- which Mr. Wood showed us, which at least took  
20 me back to high-school math, and I enjoyed it, the  
21 version talked -- that was mentioned there, 16.2.0.9,  
22 isn't one of the copyrighted works, but you've heard  
23 that from me before.

24 Secondly, I think that we're doing Tara  
25 Flanagan, a lawyer in California, who at the time was

1       inhouse at Extreme, a little bit of a disservice in this  
2       courtroom. The Court may hear about this another day,  
3       maybe, further down the road, but my client has been  
4       trying to negotiate a license for this stuff for quite a  
5       while. And in the context of those pre-suit  
6       negotiations, she had an open line of communication with  
7       counsel for SNMP.

8                  The idea that in a pre-suit, if not even  
9       settlement communication, that a counsel would say,  
10      "Here is a big list of product SKUs that trace to our  
11     acquisition from the Broadcom business unit, which the  
12     lawyers said have SNMP code," that is very, very  
13     different than outside counsel in a federal courtroom  
14     making representations about whether asserted code is in  
15     a product or not.

16                  All of that said, my concern is more of a  
17     practical one. If we are talking about us producing  
18     source code for that many products across a five-year  
19     period of time, I'm actually concerned about the burden  
20     for all of us. That would be -- I want to be very  
21     clear. I'm not making a representation to the Court  
22     because I don't know the quantity of source code trees  
23     we're talking about. I believe that would be an obscene  
24     quantity of data to be hosting on a secure non-network  
25     machine for source code review by parties and their

1 experts.

2 It's for that reason -- and this is the last  
3 time I'll make this suggestion, and if it doesn't get  
4 traction, I won't raise it again. My thought would be  
5 to start with the initial round of products that the --  
6 and they did not misrepresent me. My thought was: They  
7 give us the copyright registrations. We give them the  
8 source code for the products as we acquired them.

9 Once counsel and experts on both sides are  
10 equally equipped with that same set of information, then  
11 we have a meet and confer about what kind of searches  
12 can be run to see which other source code versions  
13 should be fair game for this case.

14 So, on that point -- I mean, to be fair, to be  
15 very, very clear, of course, if this Court orders that  
16 you want us to produce all source code for all of those  
17 products, we will, of course, do that. If you ask me  
18 the date on which to do that, I think it might be -- we  
19 might need, like, 40 days because of the quantity of  
20 terabits, gigabits at issue.

21 But I intend not to be hiding the ball with my  
22 idea that we make that initial, more-limited production.  
23 I intend that to be a more practical solution. We'll  
24 get it over to them. You've heard me riff on this  
25 before. They will ask us to search everything that has

1       the word "and." We'll say, "Only with 92 boolean  
2       points." We will negotiate and come to some agreed-upon  
3       search. I think that is going to be far, far more  
4       practical for the parties.

5                  Thank you for the Court's time.

6                  THE COURT: So if the future versions are not  
7       considered and it's just the ones listed in the  
8       Complaint, what would that time estimate be?

9                  MR. NEUKOM: Well, I'm in danger of getting in  
10      trouble because my client's not here. But I can tell  
11      you that either Ms. Demers and I would make sure that  
12      was produced in 20 days, or, if not, we would offer the  
13      Court a good-cause affidavit explaining to you why we  
14      couldn't meet the 20-day deadline and asking for the  
15      Court's mercy.

16                 But I just want to make sure that the client  
17      doesn't have a source code repository issue or  
18      something. But I can tell you from our part, that's  
19      what we can commit to giving you our best efforts on.

20                 THE COURT: Okay.

21                 MR. NEUKOM: Thank you.

22                 THE COURT: Thank you.

23                 MR. WOOD: Your Honor, if I may.

24                 THE COURT: Yes.

25                 MR. WOOD: So, in the Complaint, we've listed

1       the products. We haven't listed versions. And then we  
2       asked them to identify everything that has it, which  
3       they haven't done. So that's why we're asking -- I  
4       mean, we're asking for all versions across the time  
5       period.

6               I'd like to point out that, you know, this has  
7       been pending -- this request has been pending since, I  
8       think, December of 2020, and --

9               THE COURT: This first step should have been  
10       done a long time ago.

11              MR. WOOD: And Extreme has not submitted or  
12       Brocade/Broadcom has not submitted anything to explain  
13       the burden of doing this.

14              I believe Mr. Neukom prefaced his comment about  
15       obscene quantity with he doesn't really know, and he  
16       said before, he really doesn't even know what's in the  
17       software. He doesn't -- I mean, it's pure speculation.  
18       There is nothing before Your Honor to show that there  
19       is -- there is any burden.

20              So, I think with that, we should move forward  
21       with Your Honor's proposal, and, you know, we can meet  
22       any of those time frames with our production. Whatever  
23       Your Honor thinks is reasonable. 20 days, 40 days. We  
24       can do it quicker than 20 days if we need to. And I'd  
25       be glad to answer any other questions.

1           I do feel like I need to respond to one thing  
2 Ms. Plessman said, continue or a frame that somehow we  
3 represented that it wasn't registered. That's not what  
4 we said. I think Mr. Ashley addressed that in his  
5 opening, but I think I can continue to use Mr. Neukom's  
6 book analogy. It's the equivalent -- when we  
7 registered -- when SNMP, when Dr. Case registers Version  
8 16, he's registering all the code that he has. It's all  
9 one version.

10           When code is shipped to a particular entity,  
11 they get a subset of that code. And so when we  
12 register, we're registering the entire book. They have  
13 chapters 1 through 3. And what they keep saying is,  
14 "Show us where you registered" -- "your registration  
15 says chapters 1, 2 and 3." And we say, "Well, we've  
16 registered it in the book." Then they're like, "Well,  
17 then, you didn't register chapters 1, 2 and 3." It's  
18 like, "We did register chapters 1, 2, and 3. We  
19 registered it with the book. We registered it with all  
20 the code. You have a subset of the code."

21           So we've explained that to them over and over.  
22 They won't tell you that part. They just keep saying,  
23 "You said it wasn't registered." We never said that.  
24 It's registered as a part of the whole.

25           So it's definitely registered, as Mr. Ashley

1 said. They will see that. They already have, you know,  
2 the copy that they have. So I really don't think that's  
3 an issue and we should proceed.

4 I don't know if we want to move on to the SNMP  
5 Research software. I guess we still need to set a date  
6 for the production.

7 THE COURT: Yes. So, Ms. Plessman, can you  
8 make the -- so this would be my thought: There would be  
9 20 days for the exchange of the copyright. So at the  
10 same time, it would be for the source code of the  
11 products listed in the Complaint during that time frame.  
12 And then we'll set a deadline for the subsequent  
13 versions.

14 MS. PLESSMAN: And just so I understand,  
15 because, again, just going back to the -- when we talk  
16 about products, what we are talking about, really, is  
17 the operating system, which would be consistent across  
18 all products. So the products listed in the Complaint  
19 and in Interrogatory 1 when we're talking about the --

20 THE COURT: So I'm looking at --

21 MS. PLESSMAN: -- operating system.

22 THE COURT: I'm looking at paragraph 64, which  
23 are the -- in the Complaint, which appears to be the  
24 claimed product families.

25 MR. WOOD: Yes. And I think we can agree with

1 Ms. Plessman. So what they call their -- they call  
2 their software operating system, I think it's really the  
3 software that runs on a Linux operating system, probably  
4 embedded. And to the extent they use the same software  
5 in every product, they would just need -- I mean, that  
6 would be one production. They just need to represent  
7 that to us.

8                   So if they say this is the software version and  
9 it runs on all of these products, then we're not  
10 expecting them to produce the exact same thing, you  
11 know, 15 times.

12                  But it's however they do -- if it's different  
13 for every product, we want to get the different version  
14 for every product. We don't actually know. But I think  
15 what she is saying, and it may be the same -- and I  
16 think it's the same for Extreme. And if that's the  
17 case, it's really not an obscene burden to produce it if  
18 it's -- if they're using shared code, which most -- you  
19 know, most companies do that. It's just efficient.

20                  THE COURT: Ms. Plessman, can you do that, just  
21 represent if it's on -- if it's the same product on  
22 various platforms?

23                  MS. PLESSMAN: Yeah, I think we can make a  
24 representation of something like that, and I think that  
25 makes a lot of sense so that we don't just have to

1 produce a bunch of the same stuff. But I still have the  
2 concern because we're talking about the operating system  
3 and the SNMP portion is a -- very easily isolated, what  
4 I would propose is that we can extract the SNMP portion  
5 relatively quickly. It's in files. They know this.  
6 It's not -- it's not mixed in with the rest of the code.  
7 It's something that we can just pull out of the  
8 operating system. They will know the versions. They  
9 will know the dates. So I think, certainly, it's a  
10 first step, and especially if they want to move things  
11 along, that seems like the best way to do it.

12 THE COURT: What is the issue with that,  
13 Mr. Wood?

14 MR. WOOD: Yeah. Well, Your Honor, we don't  
15 know that. We don't know -- I mean, we haven't seen  
16 their source code. We don't know how they integrated it  
17 into the product. Maybe they kept a lot of it separate.

18 There are almost always extensive modifications  
19 in order to fit it into their product. So without going  
20 into too much detail, every -- one of the reasons you  
21 have source code is they have to -- so their product has  
22 specific values, like temperature. Well, that sensor,  
23 they have to integrate whatever reads that with the SNMP  
24 code so then you can monitor the temperature of the box.  
25 Well, there are thousands of those.

1           So there is integration that goes on with SNMP.  
2       We don't know what they have done. And they may have  
3       replaced our code with open source code. We won't know  
4       until we see it. They may have partially replaced our  
5       code with open source code. That's why we want to see  
6       all the versions.

7           If they did and there is nothing there, well,  
8       then, we won't have any claim for those versions. But  
9       we don't want to take their representation that, "Oh, it  
10      no longer exists. You don't get to see it," because it  
11      did exist. When did they actually take it out? Did  
12      they take all of it out? Where is it in there?

13       We can't have them picking and choosing what we  
14      see and say, "Oh, it's only this little piece," and then  
15      we go, "Well, we think you left this out." "Oh, we  
16      didn't use that." "Well, you had to use that or it  
17      didn't work." "Well, we didn't use it." And, again, we  
18      just need to see the whole thing.

19       And, again, they haven't presented anything  
20      that says there is a burden for them to do that. You  
21      don't have anything before you that represents that.  
22      Neither Extreme or Brocade has done that. And if it  
23      really was a burden, why didn't they submit that?

24           THE COURT: Ms. Plessman, can you come up just  
25      so we can make sure you're heard?

1           I'm sorry, Ms. Plessman. I need to consult  
2 something to help another judge. Just a minute.

3           Sorry, Ms. Plessman. Go ahead.

4           MS. PLESSMAN: Oh, no problem. I was going to  
5 say, I was a bit surprised by what I just heard from  
6 Mr. Wood because he was actually the one that told me  
7 when we were originally negotiating source code protocol  
8 and we were kind of questioning the difficulties that it  
9 should be no problem because the SNMP portion of the  
10 operating system is in separate, easily-isolated  
11 folders. So that initially came from Mr. Wood. So what  
12 he's saying now is a little bit surprising to me, and I  
13 think he knows that that's just not the case.

14           And what I would say, though, is that we've  
15 never said that the -- we will never produce the entire  
16 operating code if it becomes apparent that that's  
17 necessary. What we've said is that because we have  
18 these serious concerns -- and I know they say they  
19 didn't make that admission. We disagree. But they've  
20 also said that that can be readily determined. It can  
21 be quick. That very first stage, we think,  
22 before -- it's not about burden. It will be a lot of  
23 work, but --

24           THE COURT: We're just past that --

25           MS. PLESSMAN: Yeah.

1           THE COURT: -- because they're going to turn  
2 over their copyright information --

3           MS. PLESSMAN: Right.

4           THE COURT: -- and they have represented there  
5 is no problem with that. So we need to get past that.

6           MS. PLESSMAN: So what I'm saying is: As the  
7 first step, while we have that initial comparison, we  
8 think it makes sense to just pull the SNMP portions.  
9 Again, this is a tiny fraction of the overall operating  
10 system because what we're talking about here is  
11 Brocade's operating system.

12          THE COURT: And is that going to track  
13 everything that is needed as the -- with the parameters  
14 being everything set forth in paragraph 64 of the  
15 Complaint?

16          MS. PLESSMAN: We believe it will show  
17 everything that the -- the SNMP code that was included  
18 in the operating system is what we are saying we'll  
19 provide.

20          THE COURT: And what might that exclude,  
21 Mr. Wood --

22          MR. WOOD: Well --

23          THE COURT: -- if she is saying that she is  
24 going to supply everything from the SNMP?

25          MR. WOOD: So we've been hearing arguments for

1 over a year that they don't know what SNMP Research  
2 software is; our definitions are confusing; they can't  
3 figure it out, and now they're able to identify exactly  
4 what it is and they're able to exactly pull it out and  
5 it's very easy to do.

6 So we just -- it's exactly -- Brocade argued  
7 exactly the opposite in the A10 case, which is, you  
8 can't let the defendants determine what they produce in  
9 a copying case.

10 We need to see it and we get to determine if  
11 it's our code or not. We can't have them -- I mean, the  
12 problem is they may only give us a small subset.

13 So, like I said, we have not seen their code.  
14 We haven't seen how it's integrated. So if Ms. Plessman  
15 knows it's separate, it could be separate. I don't  
16 know. I know there is an integration work they have to  
17 do. I just don't know -- I just don't know what they  
18 have done because we haven't seen it.

19 THE COURT: All right.

20 MR. WOOD: And, like I said, they haven't  
21 submitted any burden --

22 THE COURT: Right.

23 MR. WOOD: -- for producing it. And I think  
24 she was saying it's shared code across multiple products  
25 which makes it even less of a burden to produce.

1 MS. PLESSMAN: I would just point out, the A10  
2 case is a very different case. Again, we're talking  
3 about copying versus this is an isolated -- they know  
4 exactly what their code looks like, and they will know  
5 when they see what we produce that that is the code.  
6 This is a --

7 THE COURT: Ms. Plessman, I don't want to get  
8 to the point where I say, "Okay. Produce those files,  
9 just SNMP," and then you say, "Oh, there is a problem  
10 with the definition," because I don't want to have to  
11 sit here another hour or so and we come up with a  
12 definition as well. I don't even think that should be  
13 necessary. Like, you know what you have. You're  
14 telling me.

15 MS. PLESSMAN: I think that's a very different  
16 issue because what we've always said is that for  
17 Brocade, we can provide what SNMP provided to us and we  
18 know what -- for Brocade what is in the system and has  
19 been in -- for SNMP what is in the system.

20 When we're talking about the SNMP Research  
21 software definition, we're talking about as it's applied  
22 across 150 entities and knowing what they may or may not  
23 have and all the different iterations.

24 And so we've just simply said it should be  
25 what's provided to us under the license agreement, which

1       would be what we would be providing in this exchange,  
2       you know, as it's integrated into the operating system  
3       or registered in the Complaint.

4           So those are two -- those are two different  
5       issues. We wouldn't argue that we can't identify the  
6       SNMP software in the operating system. It's just -- and  
7       I think they know this. It's an isolated file that is  
8       for SNMP.

9           THE COURT: Okay. Mr. Neukom, did you have  
10      something to add?

11           MR. NEUKOM: Two brief -- well, I don't know if  
12      they will add, but I'll try. Two brief notes.

13           Number one, I think there has been a confusion  
14      about what the defendants' messaging here has been. The  
15      point has never been that SNMP Research software was an  
16      unfathomable term. The point was in an adversarial  
17      proceeding, we need specificity, especially when we're  
18      being asked to make a production with representations.

19           So the idea that on a Brocade/Broadcom side or  
20      on the Extreme side that we are able to isolate a folder  
21      in a file folder that is associated with SNMP is in no  
22      fashion inconsistent with defendants properly saying,  
23      "You definition of SNMP Research software is unworkably  
24      broad."

25           You know, I don't know if the Court remembers

1       this, but -- because it was now two hours ago, but I  
2       think it was Mr. Ashley or maybe Mr. Wood at one point  
3       read for this Court what the discovery instrument  
4       definition of that was.

5                 I hope the Court was paying careful attention  
6       to bucket three, which was -- and I'm paraphrasing --  
7       anything that SNMP ever created. That goes back to the  
8       boring scenario of me and Ms. Demers working hard and  
9       not understanding how we can make a certification.

10               My second point is: Maybe I had misunderstood  
11      this, but I think that we've been talking about,  
12      functionally speaking, the definition of SNMP Research  
13      software the whole time. I mean, the whole point of the  
14      definition of that term is to try to get us to some sort  
15      of greased-wheels position on discovery.

16               So if the Court would like to have further  
17      colloquy with all of us about how we want to define that  
18      term, we are, of course, at the pleasure of the Court.

19               By the way, we've moved back all of our travel.  
20      So we're with you for as long as you'd like us today.

21               THE COURT: Okay.

22               MR. NEUKOM: But I'm not sure there is much  
23      utility to that, to having, like, a separate -- it would  
24      almost feel to me like a philosophy debate.

25               If what we agree upon today is -- and I'm not

1 going to try to restate or shade in my favor, but this  
2 simultaneous exchange scenario we've just described, I  
3 respectfully submit for purposes of interpreting SNMP  
4 Research software and for most other discovery disputes,  
5 that is a huge amount of progress and it gets us moving  
6 over the next month. Thank you.

7 THE COURT: Thank you.

8 MR. ASHLEY: Your Honor, if I could just say a  
9 couple quick words. I started this day, and I do think  
10 that if we keep our eye on the ball right now, which is  
11 the products alleged in the Complaint, their actual  
12 accused products in the Complaint, we delineated them.  
13 We have a basis for it. We're asking for the code in  
14 those products, all the way up from 2017 to the present  
15 day. They have it. They should have nothing to hide if  
16 they didn't copy. We've always offered to say, in  
17 exchange, we'll do a simultaneous exchange of our code.

18 What you're hearing is, "Well, there might be  
19 some extra code that you don't need." Compare that with  
20 the fate we suffer if they control what we get to see.

21 It's not privileged material. It's not  
22 attorney work product. They're saying it's just  
23 extraneous code that we don't need to see. That's why  
24 we have a protective order with very detailed provisions  
25 protecting source code. So that just means we have more

1 review to do. And if they really had a burdensome  
2 argument, they would have made it.

3 Mr. Neukom indicated he can do this in 40 days.  
4 We could do it in 40 days, too. We can do a  
5 simultaneous exchange. But you could also order it  
6 earlier. I think they could do that. But it should be  
7 the full code in the products.

8 And if there is extraneous codes that the  
9 parties don't need to look at or that's ultimately not  
10 used in the case, no harm. But that contrary, which is  
11 if you give them control of what they show us because of  
12 what internal folder they look at for the very products  
13 they already admitted pre-suit they needed a license  
14 for -- I read you the language, but they didn't have  
15 one -- you're giving the fox control of the henhouse.  
16 And there is no justification for that under the broad  
17 definition of relevance and when they haven't put in any  
18 affidavit of burden.

19 So I suggest that you do what you originally  
20 indicated, which is a simultaneous exchange on a date  
21 certain. We give them the code at the Copyright Office  
22 and they give us the code for all of the accused  
23 products in the Complaint from January 1st, 2017 to the  
24 present. And then we can define SNMP software for what  
25 else they search for.

1           But those -- those allegations in the Complaint  
2 on those particular accused products should not be a  
3 debate. They will have their defenses, but we can  
4 debate SNMP Research software and how to define it.

5           I would suggest that we keep what we have in  
6 the current discovery. And then what I've suggested to  
7 both Broadcom and Brocade and to Extreme is: You heard  
8 complaints that they don't know if SNMP has some  
9 subsidiary, you know, in Venezuela. Well, we don't.  
10 And I said we can use the definition to include only the  
11 two named plaintiffs when they're searching for our  
12 software, and then the exact same litany of ones where  
13 they say agents, attorneys, etcetera, that they use to  
14 define our client in their own discovery. So that  
15 should take care of that problem.

16           We said we'd carve out any contracts they have.  
17 So if they have other legitimate contracts to SNMP  
18 software, we'll carve it out, and that should take care  
19 of the issues that they're complaining about.  
20 Everything else they're complaining about is: They  
21 don't know if the case is that good; they want to do a  
22 copyright analysis. They should not be doing a merits  
23 legal analysis to tell us which software of ours is in  
24 their products.

25           But that's another day. I agree with

1       Mr. Neukom. If we can leave today with this  
2       simultaneous exchange of source code on a date certain  
3       but for all the products in the Complaint, I think we've  
4       gotten a lot done today.

5                  Your Honor, I would also -- my colleagues tell  
6       me we would also like -- just because of the impending  
7       deadlines -- the Court to order a date certain for them  
8       to produce whatever else you order ultimately, in terms  
9       of all the other objections and all the other requests.

10               THE COURT: Yes.

11               MR. ASHLEY: Including the ones that they say  
12       they're just working on or they want a further meet and  
13       confer. We think we're so far past that point.

14               THE COURT: Yes, I'll take it under advisement  
15       for the rest of that. I just want to, today, get things  
16       moving in the interim.

17               MR. ASHLEY: One thing that I didn't -- that we  
18       haven't clarified is that we want the build environment  
19       as well with the source code. I mean, it's going to be  
20       in the same location. They have indicated no burden to  
21       produce that.

22               THE COURT: Let me ask this: I heard that that  
23       may -- it sounded to me like it would be unnecessary for  
24       the build environment if you had the full source code.

25               MR. ASHLEY: Yeah. Well, like I said earlier,

1       when they produce the source code --

2           THE COURT: Uh-huh.

3           MR. ASHLEY: -- you heard it could be a single  
4 big source code that covers all the products, and when  
5 they produce that source code and then we analyze it for  
6 copying, they can later allege that we haven't met our  
7 burden of proof because we haven't shown that the source  
8 code, that particular portion of the source code,  
9 actually made it into the product. In the build  
10 environment is how you determine which portion of the  
11 source code actually makes it into the final product.

12          THE COURT: Okay.

13          MS. PLESSMAN: Your Honor, may I address --

14          MR. ASHLEY: Okay. I should have also said you  
15 need the build environment and the install images to do  
16 that. Nobody has even contended it would be difficult  
17 to produce the install images. They're literally sent  
18 to the customer with the product.

19          THE COURT: I recall that. Thank you.

20          MS. PLESSMAN: Can I just address that?

21          THE COURT: Please come to the podium.

22          MS. PLESSMAN: With respect to the build  
23 environment and the install images, this is something  
24 that has barely been discussed in any of the meet and  
25 confers. We've heard hardly anything about why it's

1       necessary except for today. I think there is a  
2       paragraph in the Motion to Compel. It actually is a  
3       very big deal and it's completely unnecessary.

4               So what I would submit is: Let's do a source  
5       code exchange, and if we need the build environment or  
6       the install images, I mean, my understanding is that it  
7       is many, many gigabits of data and it's not necessary  
8       given the type of product that we're talking about and  
9       the SNMP protocol at issue. It's just not. It's not  
10      necessary, and I think it will really slow things down  
11      and it will be very time-consuming.

12              So what I would suggest is that the parties  
13       meet and confer about that and what they really need,  
14       and if there is a way to narrow that, so if there is a  
15       sampling or something, or representations about what was  
16       included in the products rather than actually going  
17       through the process of producing the build environments,  
18       I think, would be a better process.

19              And then one other -- to the extent that you  
20       are planning on issuing an order on the -- you know, the  
21       other remaining document requests, I would just say,  
22       again, we -- the starting point is the definitions. It  
23       doesn't mean that after we settle the definitions and  
24       get -- and narrow the request in that way that they're  
25       not still problematic. And I would say one particular

1 area has to do with the financial documents. And I  
2 think I pointed that out.

3                 But I just don't want to see an order that  
4 would be kind of disastrous and way overbroad. So I  
5 just wanted to raise that. You know, that's where  
6 they're seeking all documents related to all financial  
7 documents for a time period that they are not even  
8 saying was infringing, and it's just way overbroad. And  
9 what we have agreed to provide are documents sufficient  
10 to show the revenues, the profits, the costs, but not  
11 all documents relating to --

12                 THE COURT: That's what I'm going to find is  
13 the problem if you didn't provide a date when you're  
14 going to do that. That's going to be problematic.

15                 MS. PLESSMAN: For the documents sufficient to  
16 show?

17                 THE COURT: Uh-huh.

18                 MS. PLESSMAN: I think we can do that within  
19 30 days. I just -- you know, if we're talking about all  
20 documents relating to any financial documents, that's a  
21 much bigger burden.

22                 THE COURT: I'll go back and see what your  
23 written response was.

24                 MR. ASHLEY: Your Honor, on the build  
25 environment and the install images, their main briefing

1 originally was, "We don't know what it means. It's  
2 vague and ambiguous." They know what it means. Every  
3 engineer should have a build environment to do their  
4 job, and what you're still hearing now is argument from  
5 counsel on something they should have submitted an  
6 affidavit for or evidence for.

7 We don't have very much time. All you keep  
8 hearing from them is a preliminary step. They gave  
9 egregiously improper responses. They have -- they have  
10 run the clock out as far as they can. And they're still  
11 not giving you evidence that any of this is a burden or  
12 they can't do it.

13 This is Broadcom. And Extreme may be smaller,  
14 but they're still a huge company. And this product  
15 line, they're not saying -- for all we know, it could be  
16 a download that takes a day.

17 They're not -- they haven't given you any  
18 information at all on that, and that was their  
19 obligation, and they knew it was their obligation, and  
20 now we're four-and-a-half months from when our reports  
21 are due and all you keep hearing from them is a  
22 preliminary step. And I think that we've crossed that  
23 bridge. They should be ordered to produce the full  
24 source code, build environment, and install images for  
25 at least the products at issue in the Complaint on a

1 date certain, and it should be very soon, and then we  
2 can talk -- there is still going to be a lot more work  
3 to do.

4           And we haven't even gotten to the point where  
5 we can look at it and start doing the work. So I really  
6 think their protests about starting off and seeing how  
7 it goes and doing some further meet and confers, that we  
8 just -- we're past that point. So we would respectfully  
9 urge the Court to order the production of those critical  
10 items, hopefully within a date certain very soon, and  
11 they get to work today.

12           Because what's going to happen is: They're  
13 going to do the source code, and then 30 days later,  
14 we'll be fighting about the build environment. And  
15 there is -- I think if they wanted to do that, they  
16 should have responded differently a long time ago to our  
17 discovery.

18           THE COURT: Mr. Neukom, if I could ask you  
19 first. So in talking about the versions, you gave me  
20 40 days for all versions, probably 20 days for just  
21 those products in the Complaint. Do we know if it's  
22 that -- I mean, if you're looking for all of it, does it  
23 not make sense -- would it not be more efficient to do  
24 it all at one time?

25           MR. NEUKOM: So I think the distinction that I

1 was trying to make was not all products versus those in  
2 the Complaint, but, rather, the versions of the product  
3 that we received from Broadcom/Brocade versus -- within  
4 the 11 product families that they have named in their  
5 Complaint versus truing that up over the ensuing five  
6 years.

7           We have a desire how the Court rules. However  
8 you rule, we will, of course, abide by it. But the  
9 scope -- the scope of work that is to be done for that  
10 2017 set versus a five-year going back is quite  
11 different. And I just think it's a matter of volume and  
12 time.

13           If I may, on the same topic, I'm actually a  
14 little bit surprised that we're hearing argument today  
15 about source code production not being burdensome and  
16 also about it sort of being not a big deal; that people  
17 should just be producing images and build environments  
18 and entire versions. I think if there is one thing  
19 that's been clear in IP law in the last 15 years, it's  
20 that on the issue when a technology company is asked to  
21 make a production of its source code, maybe other than  
22 deposing a high-maintenance CEO, it might be the single  
23 biggest hot-button topic that arises in these cases.

24           You've heard from Broadcom/Brocade that they  
25 want to very sensitive about what source code they're

1 going to produce. Extreme has taken the same position.

2 I will not further tilt at that windmill  
3 because I think the Court has heard our thought on that.  
4 I do, however, have one other closing point which I hope  
5 is a productive one.

6 I've been disappointed a little bit today to  
7 hear a fair amount of mud slinging, and I think that all  
8 of us on this side of the courtroom or the court are a  
9 little better than that.

10 I told you, without telling you what they were,  
11 that the frustrations during the meet and confer process  
12 have been mutual. I did not go down the rabbit hole.  
13 I'm now mixing metaphors to tell you why we have been so  
14 frustrated, the inconsistencies, the fools' errands we  
15 feel like we've been sent on because I just don't think  
16 that's particularly appropriate for officers of the  
17 court to be giving to the Court in soap opera.

18 But I will represent to you this: On the  
19 Extreme side, I think on all sides, we have been  
20 engaging in this process in good faith. It has been  
21 iterative. It has been slow. But it does not mean that  
22 anybody is -- insert here -- stonewalling, bad defendant  
23 playing gamesmanship. It means that sometimes issues  
24 like this are tough. Like, how do you defend a source  
25 code copyright case when you don't have the source code

1 copyright and the plaintiff won't give it to you?

2 Now, Mr. Ashley or Mr. Wood could give you  
3 their own good soundbite to say why they have been so  
4 frustrated. But I hope for future hearings we can have  
5 a fair fight about what should be produced or not  
6 without the name calling, and, for my part, I will  
7 certainly try to do that. Thank you.

8 THE COURT: Thank you.

9 All right. I'm going to take a ten-minute  
10 recess. And so we'll -- that will make it 3:00. So  
11 we'll recess for ten minutes.

12 THE COURTROOM DEPUTY: All rise. This  
13 honorable court stands in recess.

14 (A brief recess was taken.)

15 THE COURTROOM DEPUTY: All rise. This court is  
16 again in session. Please come to order and be seated.

17 THE COURT: Okay. After taking everything into  
18 consideration, I think the most important takeaway from  
19 today is to get the parties started with the discovery.

20 So in consideration of the general time frames  
21 that were outlined, I want to set the date for the  
22 simultaneous exchange for April the 22nd, and we'll say  
23 noon. That will -- I also want to add, though, that can  
24 certainly be before that date if there is mutual  
25 agreement, but April the 22nd at noon is the cutoff

1 date. Well, that's the exact simultaneous exchange  
2 time, but if you agree to a day or two before at another  
3 exact time, let me know beforehand.

4 So this will include the plaintiffs producing  
5 the eight registered copyright works. There are eight;  
6 correct? That's what I heard in argument. Okay.

7 And then the defendants will produce the source  
8 code for all of the alleged infringing products that are  
9 set forth in the Complaint. This is going to include  
10 2017 to the present for those products because I -- I  
11 acknowledge the arguments that that would take more  
12 time, and, Ms. Plessman, I have taken into consideration  
13 your representation that the information may encompass  
14 more than just SNMP, but I do not have anything before  
15 me where I can appropriately measure any arguments as to  
16 proportionality in that regard. So, at this point, it's  
17 going to encompass those products and the versions from  
18 2017 to the present.

19 All other issues I'm going to address in an  
20 order, and that will include the issue raised regarding  
21 the build environment. So I hope just this step with  
22 the deadline of April the 22nd at noon can get you  
23 started. I hope it will be productive, and we will deal  
24 with things as we go along. But I hope with this and  
25 the order that I'll get down as soon as possible with

1 regard to the other matters will get you all well on  
2 your way into getting your case ready.

3 So, thank you for your extended time here in  
4 the Eastern District today, and I wish you all well in  
5 getting your case prepared.

6 MR. ASHLEY: Thank you, Your Honor.

7 MR. NEUKOM: Thank you, Your Honor.

8 MS. PLESSMAN: Thank you.

9 MS. RICE: Thank you, Your Honor.

10 THE COURT: Anything else we need to address?

11 MS. RICE: No, Your Honor. Thank you.

12 THE COURT: All right. We'll stand adjourned.

13 THE COURTROOM DEPUTY: All rise. This  
14 honorable court stands adjourned.

15 (Which were all the proceedings had and  
16 herein transcribed.)

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1 C-E-R-T-I-F-I-C-A-T-E

2 STATE OF TENNESSEE

3 COUNTY OF KNOX

4 I, Teresa S. Grandchamp, RMR, CRR, do hereby  
5 certify that I reported in machine shorthand the above  
6 proceedings; that the foregoing pages were transcribed  
7 under my personal supervision and constitute a true and  
8 accurate record of the proceedings.

9 I further certify that I am not an attorney or  
10 counsel of any of the parties, nor an employee or  
11 relative of any attorney or counsel connected with the  
12 action, nor financially interested in the action.

13 Transcript completed and signed on Monday,  
14 April the 11th, 2022.

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TERESA S. GRANDCHAMP, RMR, CRR  
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21 Official Court Reporter  
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